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Supreme Court, U.S.
FILED
09-647 NOV 27 2009
OFFICE OF THE CLERK

No. _____

IN THE
# Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
***Petitioners,***

COMMODITY FUTURES TRADING
COMMISSION
***Respondent***

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Date: November 27, 2009

## QUESTIONS PRESENTED

1. Is a commodity trading account *in the name of* an entity alleged by the Commodity Futures Trading Commission to be a "commodity pool" an essential material fact to any finding that a commodity pool exists?

2. Is the existence of a "commodity pool" a logical, factual and legal necessary prerequisite to any finding that a commodity pool "operator" exists as that term is defined by the Commodity Exchange Act?

3. Did the Third Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings when it failed to address the threshold summary judgment issue of petitioners' appeal?

4. Was the Third Circuit Court's failure to address the threshold summary judgment issue raised by the appeal of the *pro se* petitioners a denial of both equal protection and due process of law?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioners here and the Appellants in the United States Court of Appeals for the Third Circuit are Robert W. Shimer, ("Shimer") a citizen of the United States and resident of the Commonwealth of Pennsylvania, Vincent J. Firth, ("Firth") a citizen of the United States and resident of the State of New Jersey and Equity Financial Group, LLC ("Equity") a New Jersey limited liability company.

The Respondent is the Commodity Futures Trading Commission ("CFTC") the federal agency civil plaintiff. Other parties to the civil action in the District Court that generated the appeal of Petitioners are the individual defendants Coyt E. Murray ("Murray") and J. Vernon Abernethy ("Abernethy") and the corporate defendants associated with Murray: Tech Traders Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.

Pursuant to Rule 29.6, Petitioners are not affiliated with any of the other above stated corporate entity defendants. All of the above stated corporate entity defendants including Petitioner Equity are privately held. They are not owned by a parent company or any publicly held company owning 10% or more of their stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED | 1 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE PETITION | 9 |
| I. CERTIORARI IS APPROPRIATE WHEN-EVER A COURT OF APPEALS ABANDONS LOGIC AND COMMONSENSE AND INTER-PRETS A FEDERAL STATUTE IN A WAY THAT CREATES A FOUR FOLD UNNECES-SARY CONFLICT IN THE CIRCUITS | 9 |
| A. The Third Circuit Panel Opinion conflicts with the Ninth Circuit's conclusion about the sufficiency of the statutory definition of CPO for determining whether a particular entity is subject to the provisions of the CEA | 10 |
| B. The "statutory definition approach" of the Third Circuit Panel for deter-mining whether a CPO exists under any particular set of facts conflicts with Ninth Circuit's common sense approach of first determining if a "commodity pool" is being operated | 14 |

C. The Third Circuit Panel Opinion conflicts with the *actual test* adopted by the Ninth Circuit for determining if a "commodity pool" exists under any particular set of facts..... 18

D. The Panel Opinion is also in conflict with the Second Circuit's understanding of the statutory scheme of the CEA and the importance of being "actively involved in commodities trading" in order to trigger a registration requirement under that act..... 20

II. CERTIORARI IS APPROPRIATE AND NOW NECESSARY TO RESTORE CLARITY TO THE DETERMINATION OF WHAT ENTITIES MUST REGISTER AS COMMMODITY POOL OPERATORS. 21

III. CERTIORARI IS APPROPRIATE WHEN A FEDERAL APPELLATE OPINION RESULTS IN AN EXPANSION OF FEDERAL AGENCY ENFORCEMENT AUTHORITY NOT AUTHORIZED BY CONGRESS 25

IV. THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS APPROPRIATE BECAUSE THE THIRD CIRCUIT PANEL DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED A SIMILAR DEPARTURE BY THE NEW JERSEY DISTRICT COURT..... 28

V. THIS COURT HAS A LONG TRADITION OF GRANTING CERTIORARI TO PROTECT THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW..... 31

A. The District Court's response to the *pro se* legal arguments of Shimer and Firth offered in support of two separate motions for summary judgment violated both their constitutional due process right to be heard and right to equal protection under the law..... 31

B. Given the unique threshold and potentially dispostive CEA issues of the present matter the failure of the Third Circuit Panel to engage in *any appellate review* of the correctness of the twice denial by the District Court of Shimer and Firth's separate *pro se* motions for summary judgment violated both their constitutional right to due process and equal protection under the law..... 34

CONCLUSION ..... 37

APPENDIX ..... 1a

Opinions and Orders of the Third Circuit Court
Order consolidating separate appeals of all Petitioners ..... 2a
Opinion of the Panel..... 3a

Judgment of the Panel ..... 31a

Opinions and Orders of the District Court
Opinion (Entry No. 266) 10/04/2005 denying Shimer & Firth motions for summary judgment ..... 32a
Accompanying Order (Entry No. 267) of 10/04/2005 ..... 42a

Opinion (Entry No. 409) 11/16/2006 denying Shimer and Firth motions for summary judgment ..... 44a
Accompanying Order (Entry No 410) of 11/16/2006 ..... 53a

Opinion (Entry No. 419) 12/18/2006 (relevant pages 5 and 6) granting partial summary judgment to the CFTC 54a

Panel denial of Petition For Rehearing dated 9/09/2009 ..... 57a

Panel Order dismissing previous Appeal of Shimer & Firth from 11/16/2006 denial by the District Court of motions for summary judgment ..... 59a

U.S. Constitution Amendment 5 ..... 62a

28 U.S.C. §1291 ..... 62a
7 U.S.C. §1a(5) ..... 62a

17 C.F.R. §4.10(d)(1) ..... 63a

CPO Trading Related Reporting Regulations
17 C.F.R. §4.22(a)(1)(i,ii,iii,vi & vii) ..... 64a
17 C.F.R. §4.22(a)(3) ..... 65a
17 C.F.R. §4.22(e) ..... 66a

CPO Trading Related Recordkeeping Regs
17 C.F.R. §4.23(a)(1) ..... 67a
17 C.F.R. §4.23(a)(7) ..... 67a
17 C.F.R. §4.23(b)(1) & (2) ..... 68a

CPO General Trading Related Disclosure Regs
17 C.F.R. §4.24(b)(1) ..... 69a
17 C.F.R. §4.24(b)(2) ..... 70a
17 C.F.R. §4.24(e)(5) & (6) ..... 71a
17 C.F.R. §4.24(f)(1)(v) ..... 72a
17 C.F.R. §4.24(g) ..... 72a
17 C.F.R. §4.24(h)(1)(i) ..... 72a
17 C.F.R. §4.24(h)(2) ..... 73a
17 C.F.R. §4.24(h)(3)(i & ii) ..... 73a
17 C.F.R. §4.24(h)(4)(i & ii) ..... 74a
17 C.F.R. §4.24(i)(2)(ii, iii & x) ..... 74a
17 C.F.R. §4.24(j)(3) ..... 75a
17 C.F.R. §4.24(l)(1)(iii) ..... 76a
17 C.F.R. §4.24(m) ..... 76a
17 C.F.R. §4.24(s)(1, 3, 4 & 5) ..... 77a

CPO Trading Related Performance Disclosure Regs
17 C.F.R. §4.25(a)(1)(i)(C) ..... 78a
17 C.F.R. §4.25(a)(1)(ii)(A) & (B) ..... 78a
17 C.F.R. §4.25(b)(1) ..... 79a
17 C.F.R §4.25(c)(1)(i)&(ii) ..... 79a
17 C.F.R. §4.25(c)(2)(i)(A) ..... 79a
17 C.F.R. §4.25(c)(2)(ii) ..... 80a
17 C.F.R. §4.25(c)(3)(ii) ..... 81a

17 C.F.R. §4.25(c)(4)(ii) ..... 81a

Pages 1 & 2 of CFTC Brief dated April 1, 2004 In support of Motion For Ex Parte Restraining Order and Preliminary Injunction ..... 82a

Shimer Brief filed April 7, 2006 excerpt: legislative history analysis of CPO related sections of the Commodity Exchange Act ..... 84a

CFTC expert witness testimony found in the record before both the Appellate Court & the District Court ..... 94a

Notice of Appeal of Robert W. Shimer ..... 99a

## TABLE OF AUTHORITIES

**Cases** **Page**

*Armstrong v. Manzo*, 380 U.S. 545 (1965)..... 31
*Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986) ..... 30
*Brown v. Mississippi*, 297 U.S. 278 (1936) ..... 35
*Campbell v. Galeno Chemical Co.* 281 U.S. 599 (1930) ..... 26
*Celotex Corp v. Catrett* 477 U.S. 317 (1986) 5,29,30
*CFTC v. British American Commodity Options Corp.* 560 F. 2d 135 (2d Cir. 1977) ..... 20,21
*CFTC v. Equity Financial Group, LLC et al.* 2005 WL 2864784 (D.N.J. Oct. 4, 2005) .. 1
*CFTC v. Equity Financial Group, LLC et al.* 2006 WL 3359418 (D.N.J. Nov. 16, 2006) 1

*CFTC v. Equity Financial Group, LLC et al.* 2006 WL 3751911 (D.N.J. Dec. 18, 2006) 7
*CFTC v. Equity Financial Group, LLC et al.* 537 F. Supp. 2d 677 (D.N.J. 2008) ..... 8
*CFTC v. Equity Financial Group, LLC et al.* 572 F.3d 150 (3rd Cir. 2009) ..... 1,8
*CFTC v. Heritage Capital Advisory Services, Ltd., et al* Comm. Fut. L. Rep. (CCH) ¶ 21,627, 26,379 (N.D. Ill. 1982) ..... 5
*Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) ..... 35
*In re Oliver*, 333 U.S. 257 (1948) ..... 35
*In re Winship*, 397 U.S. 358 (1970) ..... 35
*Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951) ..... 32
*Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986) .... 4,5,6,10,14,15,18,19,30,32,34
*Lynch v. Tilden Produce Co.*, 265 U.S. 315 (1924) ..... 25,27
*Manhattan General Equipment v. Commissioner of Internal Revenue* 297 U.S. 129 (1936) ..... 25
*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 32
*Miller v. United States*, 294 U.S. 435 (1935) ..... 25
*Morrissey v. Brewer*, 408 U.S. 471 (1972) ..... 35-36
*United States v. Grimaud* 220 U.S. 506 (1911) .. 26
*United States v. Torres*, 383 F.3d 92 (3d Cir. 2004) ..... 31
*Watson v. Amedco Steel, Incorporated* 29 F.3d 274 (7th Cir. 1994) ..... 28
*Wayman v. Southard* 23 U.S. 1 (1825) ..... 26

**Constitutional Amendments**

Fifth Amendment ..... 1

**Statutes**

7 U.S.C. § 1a(5) .....2,11,12,13,15,25,27,28
7 U.S.C. § 1 *et seq.*, ..... 21
7 U.S.C. § 13a-1 (2002) ..... 2
28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1291 ..... 1

**Regulations**

17 C.F.R. § 4.10(d) ..... 24
17 C.F.R. § 4.10(d)(1) ..... 2,13
17 C.F.R. § 4.22 ..... 2,12
17 C.F.R. § 4.23 ..... 2,12
17 C.F.R. § 4.24 ..... 2,12
17 C.F.R. § 4.25 ..... 2,13

**Rules of the Supreme Court of the United States**

Rule 10 ..... 9

**Federal Rules of Civil Procedure**

Federal Rule of Civil Procedure 50(a) ..... 30
Federal Rule 56(c) ..... 30, 31
Federal Rule 56(b) ..... 33

**Federal Register**

44 Fed. Reg. 1918, 1924 (January 8, 1979) ..... 24

**Commodity Futures Law Reporter**

Comm. Fut.L.Rep. (CCH) ¶21,188, 24,891 ..... 24

Robert W. Shimer, Vincent J. Firth and Equity Financial Group, LLC respectfully petition this Honorable Court for a Writ of Certiorari to review the Panel Opinion and Judgment of the United States Court of Appeals for the Third Circuit affirming the various opinions of the District Court and rejecting their petition for rehearing.

## OPINION BELOW

The Opinion of the Court of Appeals (App. 3a-29a) affirming the judgment of the District Court was reported at 572 F.3d 150 (3rd Cir. 2009). The denial of Petitioners' Petition for Rehearing (App. 57a-58a) was not reported. The two separate opinions and orders of the District Court (App. 32a-41a; App. 44a-52a) denying Shimer and Firth's motions for summary judgment were reported respectively at 2005 WL 2864784 (D.N.J. Oct. 4, 2005) and 2006 WL 3359418 (D.N.J. Nov. 16, 2006).

## JURISDICTION

The opinion of the Court of Appeals affirming the final Opinion of the District Court was entered July 13, 2009. Petitioners' petition for rehearing was denied by the Court of Appeals on September 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

**U.S. Constitution Amendment 5**
(Appendix, page 62a)

**28 U.S. C. § 1291**
(Appendix, page 62a)

**7 U.S.C. § 1a(5)**
(Appendix, page 62a)

**17 C.F.R. § 4.10(d)(1)**
(Appendix, page 63a)

Trading specific regulations of the CFTC applicable to commodity pools and their operators:
**17 C.F.R. § 4.22** (Appendix pages 64a- 66a)
**17 C.F.R. § 4.23** (Appendix pages 67a-68a)
**17 C.F.R. § 4.24** (Appendix pages 69a-77a)
**17 C.F.R. § 4.25** (Appendix pages 78a-81a)
(Note: portions of the above CFTC regulations that refer to trading by the pool and/or its operator or require the same for compliance are highlighted in bold for easy review.)

## STATEMENT

Subject matter jurisdiction for the District Court is found in Section 6c of the Commodity Exchange Act as amended (hereinafter "CEA"), 7 U.S.C. § 13a-1 (2002) which authorizes the Plaintiff Commodity Futures Trading Commission ("CFTC") to seek injunctive and other relief in the United States District Courts against any registered entity or other person that appears to be engaged in a violation of any provision of the CEA or any rule, regulation or order promulgated thereunder.

Petitioner Equity Financial Group, LLC ("Equity") a New Jersey limited liability company managed the non-defendant entity Shasta Capital Associates, LLC ("Shasta") a Delaware limited

liability company. Petitioner Robert W. Shimer ("Shimer") was attorney for both Shasta and its manager Equity. Petitioner Vincent J. Firth ("Firth") was the manager of Equity. Shasta was one of many corporate entities (unaffiliated with each other) that all entered into separate investment agreements with the defendant trading entity Tech Traders, Inc. ("Tech"). As attorney for the entity Shasta, Shimer forwarded member investment funds directly to Tech from his attorney escrow account at Citibank.

A civil action was filed on April 1, 2004 in the United States District Court for the District of New Jersey by the CFTC alleging various violations of the CEA. The CFTC Amended Complaint filed August 12, 2004 alleged that Equity acted as the commodity pool "operator" of the alleged "commodity pool" entity Shasta despite the fact that Shasta and its manager Equity never engaged in commodity futures trading and never represented to any of Shasta's members that Shasta or Equity intended to engage in any such trading.

Petitioners Shimer and Firth were alleged by the CFTC to be "associated persons" of the commodity pool operator ("CPO") Equity and, therefore, subject to the full enforcement authority of that federal agency. The CFTC also alleged violations of the CEA and regulations thereunder by the defendant Coyt E. Murray ("Murray"), his trading company Tech and the other corporate defendants affiliated with Murray and or Tech: Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. The defendant J. Vernon Abernethy, ("Abernethy") a CPA local to the trading

operation of Tech hired by Murray to verify Tech's monthly trading performance was also alleged by the CFTC to have violated the CEA and regulations thereunder.

The corporate defendants Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., and the individual defendants Murray and Abernethy settled with Plaintiff CFTC and executed consent agreements. Petitioners Equity, Shimer and Firth refused to execute any consent agreement with the CFTC.

Petitioners were initially represented by the New York law firm of Menaker & Herrmann until that firm withdrew representation of Shimer and Firth in the spring of 2005. The District Court refused to allow withdrawal for the corporate defendant Equity. Shimer and Firth, acting *pro se,* began to defend themselves and both separately filed the first of two pre-trial motions for summary judgment with respect to all counts of the CFTC's Amended Complaint (hereinafter "Motions").

The first separate properly prepared Motions meeting all requirements of the Federal Rules of Civil Procedure and the District Court's Local Rules were filed supported by Shimer's brief on July 8, 2005. That brief cited to the decision of the Ninth Circuit Court of Appeals in *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986). The Ninth Circuit Court in *Lopez* was presented with a question similar to the one in the present matter: was the defendant a CPO subject to the provisions of

the CEA as alleged by the plaintiff? The *Lopez* Court answered that question by first enumerating four very specific tests for determining if a commodity pool exists under any particular set of facts.

The fourth "test" of the *Lopez* Court was derived from and followed logically from the specific language contained in the other three tests. That fourth "test" required commodity futures trading transactions to be traded "...by a commodity pool operator *in the name of the pool* rather than in the name of an individual investor." (Emphasis added). *Lopez v. Dean Witter Reynolds, Inc.* supra, at 884.

Citing to this Court's decision in *Celotex Corp. v. Catrett* 477 U.S. 317 (1986) Shimer argued that summary judgment was appropriate and should be granted if an essential material fact to the non moving party's case was missing from the record and could not be established at trial. All other "facts" introduced or alleged by the CFTC were immaterial if there was no trading account (and therefore no trading) in the name of the alleged pool entity Shasta as specifically required by the fourth test of *Lopez*. The District Court denied Shimer and Firth's separate Motions in an opinion filed October 4, 2005. (See App. 32a-41a)

On April 7, 2006 Shimer and Firth filed two separate new Motions supported by duly certified relevant documentation from the case of *CFTC v. Heritage Capital Advisory Services, Ltd., et al* Comm. Fut. L. Rep. (CCH) ¶ 21,627, 26,379 (N.D. Ill. 1982) ("Heritage") obtained by Shimer in October, 2005 from the Federal Records Center in Chicago.

The brief filed by Shimer in support of those two new separate Motions reiterated once again the necessity of summary judgment for Shimer and Firth with respect to all counts of the CFTC's Amended Complaint if the entity Shasta was not a "commodity pool" per all prior federal case law summarized in *Lopez*. Shimer's brief continued to argue that in the absence of a "commodity pool" it was factually and legally *impossible* for Shasta's manager Equity to be the "operator" of a commodity pool and subject to the registration requirements of the CEA. Shimer pointed out to the District Court that Shasta not only failed the fourth test of *Lopez* but arguably failed at least three if not all four "tests". The District Court reprinted basically the same opinion issued a year earlier and, once again, on November 16, 2006 denied both Motions (see App. 44a-52a).

In both opinions the District Court departed from prior clear and unequivocal Ninth Circuit federal case law precedent *and concluded what no federal court had ever concluded since the establishment of the CFTC by Congress*: that an entity such as Shasta (that had never opened a commodity trading account in its name and had never traded commodity futures contracts or *indicated to anyone* any intention to do so) was, nevertheless, a "commodity pool" thereby requiring CFTC registration by Shasta's manager Equity as a commodity pool "operator" (CPO).

The District Court issued an Opinion reported at 2006 WL 3751911 (D. N.J. Dec. 18, 2006) granting partial summary judgment for the CFTC. The District Court acknowledged near the bottom of page

5 of that Opinion (App. 55a) that Shasta's status was "...the threshold issue for bringing this action under the jurisdiction of the CFTC." [1]

Shimer and Firth first filed motions for reconsideration citing the untenable nature of the three reasons given both times by the District Court for concluding that Shasta was a "commodity pool". When the reconsideration motions were granted but their Motions were again denied Shimer and Firth filed motions for disqualification and also filed a Writ of Mandamus with the Third Circuit Court on January 4, 2007 asking that District Judge Robert B. Kugler be removed from the case and replaced. On February 1, 2007 their mandamus petition was denied. On February 9, 2007 Shimer and Firth filed a joint notice of appeal from the District Court's denial of their separate second round Motions.

Shimer and Firth argued their appeal satisfied all three requirements of the "collateral order" doctrine exception to the general rule that denials of summary judgment are generally not appealable. The Third Circuit Court rejected that argument and dismissed for lack of appellate jurisdiction on July 6, 2007. (App. 59a-60a) A bench trial with respect to the remaining counts of the Amended Complaint was held in late August and early September of 2007. The District Court's final Opinion dated February 4, 2008

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[1] Only the first page (App. 54a) and pages 5 & 6 (App. 55a-56a) of the District Court Opinion granting partial summary judgment to the CFTC are produced in the Appendix. Pages 5 & 6 reflect the District Court's continuing recognition of the importance of Shasta's status for the summary judgment motions of Shimer and Firth.

granting judgment to the CFTC on all remaining counts of the Amended Complaint is reported at 537 F. Supp. 2d 677 (D.N.J. 2008).[2] Petitioners all filed separate timely Notices of Appeal. In addition to the final order (and all other intermediate District Court orders relevant to them) Shimer (joined by Firth) specifically appealed the two Opinions and Orders of the District Court that denied the separate Motions (App. 100a). All appeals of Petitioners were consolidated by the Third Circuit Court. (App. 2a)

Shimer entered an appearance on behalf of the corporate entity Equity in late July of 2008. Shimer filed a timely appeal brief on behalf of himself *pro se* and on behalf of his client Equity joined by Firth who also filed *pro se*. That appeal brief cited to an attached multi-volume 850+ page Appendix that, in part, contained Petitioners' summary judgment arguments and the opposing arguments offered to the District Court by the CFTC.

The CFTC filed a brief in opposition and Petitioners filed a brief in reply. Oral argument was heard by the Panel on March 3, 2009 and a Panel Opinion reported at 572 F.3d 150 (3rd Cir. 2009) affirming the judgment of the District Court was issued on July 13, 2009. (App. 3a-29a) A petition for rehearing en banc was filed on August 26, 2009. On September 9, 2009 that petition was summarily denied (App. 57a-58a). This petition for writ of

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[2] The text of that lengthy final opinion of the District Court is not reproduced in the Appendix because it did not again address or discuss in a substantive way the threshold "commodity pool" summary judgment issue that is the focus of this petition.

certiorari was filed timely prior to the December 8, 2009 ninety day deadline.

## REASONS FOR GRANTING THE PETITION

### I. CERTIORARI IS APPROPRIATE WHENEVER A COURT OF APPEALS ABANDONS LOGIC AND COMMONSENSE AND INTERPRETS A FEDERAL STATUTE IN A WAY THAT CREATES A FOUR FOLD UNNECESSARY CONFLICT IN THE CIRCUITS.

Rule 10 of this Court advises certiorari writ petitioners that "...certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law". This petition alleges neither though as a side note petitioners dispute the adequacy of the record to support *many* of the appellate court's fact based conclusions.

The conflict that now exists between the Third Circuit and both the Ninth and Second Circuits arises *not* because the Panel *misapplied* the appropriate rule of law standard when the issue is whether a particular defendant is subject to the provisions of the CEA. *This petition is brought because a conflict between the circuits was created by the Panel's willingness to abandon both logic and common sense in order to completely avoid the appealed dispositive threshold "commodity pool" summary judgment issue.*

**A. The Third Circuit Panel Opinion conflicts with the Ninth Circuit's conclusion about the sufficiency of the statutory definition of CPO for determining whether a particular entity is subject to the provisions of the CEA.**

In *Lopez* the district court had granted the defendant Dean Witter's motion for summary judgment on the plaintiff's claim that Dean Witter had violated the CEA by inducing her to invest in Dean Witter's Commodity Guided Account Program. The *Lopez* Court affirmed the district court's grant of summary judgment for the defendant Dean Witter. On appeal by the plaintiff, the Ninth Circuit approached the issue of whether or not Dean Witter had violated the CEA by stating:

> "(i)n order to determine whether the commodity accounts which Appellants held with Dean Witter were subject to the provisions of the statute, our first inquiry must be whether Dean Witter was running a commodity pool subject to the requirements of the Commodity Exchange Act, 7 U.S.C. Sec 1, et seq. (1982)" *Lopez v. Dean Witter Reynolds, Inc.* supra at 883.

The Ninth Circuit recognized the inherent logic and common sense necessity of first determining if a "commodity pool" was being "operated" before it was possible to conclude whether or not the defendant Dean Witter had violated the CEA as an alleged commodity pool operator ("CPO").

The *Lopez Court* noted at that same page 883 that the statutory definition of CPO [now found at 7 U.S.C. § 1a(5)] (App. 62a) provided little assistance in resolving that question. The Ninth Circuit found the statutory definition of CPO insufficient *on its face* for determining whether Dean Witter was subject to the provisions of the CEA. Noting that the CFTC regulations tracked the statute, the *Lopez* Court concluded at that same page 883 that it faced "an undecided question".

The issue presented to both the *Lopez* Court and the Third Circuit Panel was basically the same: whether the District Court's determination with respect to a defendant's prior motion for summary judgment should be affirmed when applicability of the CEA was alleged by the plaintiff. The only difference is that in *Lopez* the defendant Dean Witter and its attorneys *had been successful* before the District Court. In the present matter the summary judgment motions of the *pro se* defendants Shimer and Firth had been denied.

The Third Circuit Panel came to a completely different conclusion than the Ninth Circuit about the sufficiency of the statutory definition of CPO. The Third Circuit engaged in no credible analysis of whether the entity Shasta was a "commodity pool", *and conducted no review of the legislative history of those sections of the CEA that specifically apply to CPO's.* The Panel determined that the Petitioner Equity was a CPO based solely on the language of the statute. That conclusion turned on its interpretation of the following phrase found at 7 U.S.C. §1a(5): "...*for the purpose of trading* in any

commodity for future delivery..." (Emphasis added). (App. 63a).

There are two ways of interpreting that phrase. As Petitioners pointed out in their petition for rehearing the most logical and common sense interpretation is that the phrase was intended by Congress to mean for the purpose of trading *by the entity being defined by the statute.* In other words Congress clearly intended that entities that "operate" commodity pools would *usually* be engaged in trading for and on behalf of the "pools" they operate. Could the name "commodity pool *operator*" be any clearer in conveying exactly what CPOs do?

This interpretation of the statute is consistent with the legislative history of the CEA,[3] CFTC regulations specifically directed at commodity pool operators,[4] CFTC regulations specifically directed to required commodity pool trading related disclosures[5], all prior "pool" federal case law and the sworn testimony of the CFTC's own expert witness in

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[3] Only Shimer offered a credible analysis of the legislative history of *those specific provisions that apply to CPOs. (See pages 26-33 of DDE # 334)(App.84a-93a).* The record reflects no such in depth "CPO related analysis" of the CEA by the CFTC, the District Court or the Panel.

[4] See extensive highlighted portions of the CFTC's regulations found at 17 C.F.R. §4.22, 17 C.F.R. §4.23 and 17 C.F.R. §4.24 in the Appendix (App. 64a through 77a). Compliance with many of those regulations by a pool's operator *would be virtually impossible without an intimate knowledge of the pool's trading!*

[5] See App. 78a-81a for highlighted extensive regulations found at 17 C.F.R. § 4.25.

the *Heritage* case[6] found in the record below in Exhibit E attached to Shimer's second summary judgment brief (part of DDE Entry #334) filed on April 7, 2006. This interpretation is also consistent with the summary judgment argument continuously made *in every pre-trial brief* filed by Shimer since April 14, 2005.

The Panel chose, instead, to interpret the critical statutory phrase "...for the purpose of trading..." to mean *"for the purpose of trading" by some entity other than the entity being defined!* This particular "interpretation" is specifically contradicted by all the authorities just cited.

Citing in its Opinion only to the language of 17 C.F.R. §4.10(d)(1) the Panel contends in the last sentence of the first paragraph of footnote 13 found on pages 16-17 of its Opinion (see App. 16a-17a) that its interpretation of 7 U.S.C. §1a(5) is supported by the CFTC's regulations: "We note, however, that the regulations appear to comport with the interpretation we give the statute." How the Panel was able to arrive at that particular conclusion in the face of the highlighted portions of extensive CPO regulations of the CFTC (see App. 64a-81a) is a mystery.

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[6] The relevant portions of the sworn testimony of CFTC expert Charlotte Ohlmiller in the *Heritage* case (see App. 94a-98a) were cited in Petitioners' appellate brief and were specifically available to the Panel in Petitioners' appellate brief Appendix. Her CPO related expert testimony was ignored by both the Appellate Court and the District Court.

**B. The "statutory definition approach" of the Third Circuit Panel for determining whether a CPO exists under any particular set of facts conflicts with the Ninth Circuit's common sense approach of first determining if a "commodity pool" is being operated.**

If an entity is alleged to be the operator of "something" common sense dictates that an inquiry into the possible existence of that "something" should be the first step in resolving whether the allegation is true. Before concluding that the statutory definition of CPO was insufficient on its face for resolving its summary judgment issue the *Lopez* Court noted the practical common sense necessity of first determining if a commodity pool was being operated. *Lopez v. Dean Witter Reynolds,Inc.* supra at 883.

*Lopez* stands, in part, for the simple, clear and common sense proposition that a court must first determine if a "commodity pool" exists under any particular set of facts before it can logically conclude that a commodity pool was being "operated" in violation of the registration provisions and other provisions of the CEA.

As Petitioners pointed out in their petition for rehearing the legitimacy of the *Lopez* Court's "approach" is confirmed by a review of both the CFTC's Original Complaint and the Amended Complaint. The CFTC clearly understood *the critical importance* of the status of Shasta as an alleged "commodity pool" for establishing its CPO allegation with respect to Shasta's manager Equity. The CFTC Original Complaint (DDE #1) alleges Shasta to be a

"pool" 16 times and alleges the members of Shasta to be members of a "pool" 20 times. In the Amended Complaint (DDE #64) these allegations are made 18 times and 10 times respectively. If the CFTC was not convinced that Shasta's status as a "pool" was *critical* to its CPO allegation with respect to Equity, why did it initially cite to *Lopez* (and cases cited by *Lopez*) in support of its *numerous* "pool" allegations with respect to the entity Shasta?[7]

Because the Ninth Circuit understood the inherent logical necessity of first determining if a "pool" was being "operated" the *Lopez* Court *did not spend any time at all* trying to decipher or analyze the statutory language of the definition of CPO found at 7 U.S.C. § 1a(5). And it is relatively clear from the *Lopez* decision that even if that court had found the actual language of the statute to be more helpful than it was, the necessity of first directing a commodity pool analysis to the entity being "operated" was considered a logical and necessary common sense first step to resolving the CEA issue presented.

In its willingness to focus solely upon the language of the statute the Panel Opinion ignored and therefore placed itself in conflict with far more than the common sense approach of the Ninth Circuit. As pointed out in the petition for rehearing

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[7] See second and third pages of the filed document that is a part of DDE #5 (CFTC Brief In Support of Preliminary Injunction (DDE #5) (App. 82a-83a). The third filed page of this CFTC brief (App.83a) after citing to *Lopez* also separately refers to Shasta as a "pool" or to Shasta's members as "pool participants" five times.

the Panel Opinion ignores numerous real world "facts" about commodity pools and their operators—the most obvious and glaring being that commodity pools "trade" commodity futures contracts. Commodity pools are specialized investment entities specifically created to engage directly in commodity futures trading in the name of the pool entity for and on behalf of the pool's members. And that fact has been well known to the CFTC from the day this civil action was first filed against the Petitioners (appropriately enough) on April Fool's Day of 2004. (See CFTC regulations found at App. 64a-81a)

Trading *in the name of* the pool is always, *without exception* conducted either by the pool operator or by some other individual or entity granted that authority *by the operator* under a very specific written power of attorney. For that simple reason the CFTC, the District Court and the Third Circuit Panel were never able to cite a single federal district court or appellate opinion that held a "commodity pool" to exist in the absence of trading by someone *in the name of* the alleged pool entity. The Panel Opinion's conflict with the common sense approach of the Ninth Circuit places the Third Circuit Court *in conflict with all other commodity pool related federal case law and in conflict with the inherent reality of what all commodity pools do!*

Consequently a form of the following relevant question first posed by Shimer in his summary judgment brief filed on April 7, 2006 and later posed again in petitioners' joint appellate brief remains unanswered by the CFTC, the District Court and the Third Circuit Panel:

> "If members of the general public who need not register with the CFTC must open a commodity futures trading account at a FCM *in their name* to become "involved" in the futures markets[8] how is it that entities can be alleged by the CFTC to be "commodity pools" ("operated" by entities alleged to be commodity pool "operators" subject to *extensive* trading related CFTC regulation) [9] without any evidence that the "commodity pool" entity allegedly "operated" *ever* engaged in that most basic activity for involvement in the futures markets required of the general public?"

The Third Circuit Panel was unwilling to address or answer that question because it was apparently unwilling to acknowledge and apply an approach to the issue raised by Petitioners' appeal required by simple common sense necessity in the Ninth Circuit. As a result, the federal judiciary is now presented with an unnecessary conflict in the circuits, with a Third Circuit Opinion in unnecessary conflict with what happens in the "real world" and in unnecessary conflict with all other federal courts that have ever addressed the commodity pool issue. It is difficult to imagine all of this conflict *ever arising* if Petitioners had not been forced by their financial reality to represent themselves *pro se* first before the District Court and then before the Appellate Court .

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[8] The record below contains certified documentation from the Federal Records Center in Chicago of CFTC expert witness testimony in the *Heritage* case confirming that simple, basic and uncontroverted "fact". (See App. 95a).

[9] See App. 64a-81a.

**C. The Third Circuit Panel Opinion conflicts with the *actual test* adopted by the Ninth Circuit for determining if a "commodity pool" exists under any particular set of facts.**

The Panel Opinion gives lip service to the four "tests" of *Lopez* on pages 20 and 21 (see App. 20a-21a) but studiously avoids any serious discussion or analysis of the meaning of the specific language chosen by the Ninth Circuit in fashioning all four tests from prior federal case law. The Panel justified its willingness to avoid any substantive application of all four *Lopez* tests to the entity Shasta by "distinguishing" the facts of the "Dean Witter investment vehicle" from the facts of Shasta. (App. 18a-19a)

As pointed out in the petition for rehearing *every case* obviously presents a set of facts different *in some way* from those of prior cases. If the approach of the Panel were generally adopted by all other courts, the tradition of rule of law (i.e. following clear and well decided previous legal precedent) is easily discarded whenever it is not conducive to a certain "judicially preferred" outcome. The *Lopez* Opinion did not intimate, imply or suggest *in any way* that the four "commodity pool" tests it devised as a result of its review of prior federal "commodity pool" case law were applicable *only* to the particular facts before that Court.

The closest thing the Panel ever comes to offering any sort of workable "test" of its own for determining if a commodity pool exists under any particular set of facts is to describe commodity pools

as "...the commodity-futures equivalent of a mutual fund". (App. 13a) and cites several authorities for that proposition. Such a superficial "non approach" to the summary judgment issue raised by Petitioners Shimer and Firth is the practical equivalent of saying to all district courts in the Third Circuit: there is no practical "test" in this circuit for determining if a particular entity qualifies as a "commodity pool".

The Panel's "mutual fund" discussion offers no credible analysis helpful to the summary judgment issue raised before the District Court. Describing a "commodity pool" as similar in nature to a "mutual fund" is to revert to the level of generalized abstraction the *Lopez* Court found of little use[10] in resolving its threshold issue: what is a commodity pool? The Petitioners suggest *that was (and unfortunately still remains) the undecided threshold potentially dispositive issue with respect to Petitioner Shimer and Firth's motions for summary judgment with respect to all counts of the Amended Complaint.*

A review of the "authorities" cited by the Panel in support of its eagerness to recognize that a commodity pool is "similar" to a mutual fund reveals that none of the information they contain about commodity pools contradicts or undermines *in any way* the specific language of the four tests devised by the Ninth Circuit Court. The Third Circuit's pseudo "test" (or "mutual fund analogy") for determining the existence of a commodity pool stands in stark contrast and obvious conflict with the clarity and

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[10] See *Lopez v. Dean Witter Reynolds, Inc.* supra, at 883.

certainty of the four tests offered by the Ninth Circuit in *Lopez*.

**D. The Panel Opinion is also in conflict with the Second Circuit's understanding of the statutory scheme of the CEA and the importance of being "actively involved in commodities trading" in order to trigger a registration requirement under that act.**

Shimer devoted almost *eight pages* in his second summary judgment brief filed on April 7, 2006 to a well researched analysis of the legislative history of the CEA and the clear expectation on the part of Congress that entities required to register as CPOs would ordinarily be actively involved *in the actual trading* of commodity futures contracts. (App. 84a-93a) That legislative history analysis was made available to the Panel on pages 335-342 of the Appendix filed with Petitioners' appeal brief. *No such analysis of the legislative history of those portions of the CEA that pertain to CPOs was ever conducted by the Panel.*

The clear expectation of Congress regarding the involvement of CPOs in the actual trading of commodity futures is reflected in the Second Circuit Opinion of *CFTC v. British American Commodity Options Corp.* 560 F. 2d 135, 138 (2d Cir. 1977) where that appellate court clearly and correctly observed:

> "In the 1974 Amendments to the Act, 7 U.S.C. § 1 et seq., Congress established the

> Commodity Futures Trading Commission and set up a comprehensive scheme for regulation of trading in commodity futures. Central to this statutory scheme is the requirement that persons *actively involved in commodities trading* shall be registered with the Commission." (Emphasis added).

The periodic transfer of Shasta's funds from an attorney escrow account at Citibank for the purpose of making an ongoing investment with the separate unaffiliated trading entity Tech *is not* an activity that qualifies either Shasta or its manager Equity as being "actively involved in commodities trading." The act of merely investing in another unaffiliated entity such as Tech (that engages in trading from its own accounts) does not bring Shasta's manager Equity within the clear intent of Congress as that intent was accurately stated above by the Second Circuit.

The above stated understanding of the Second Circuit Court of Appeals with respect to the statutory scheme of the CEA stands in direct conflict with the Panel's conclusion about the CPO status of Petitioner Equity. That is especially so *in the absence of any evidence in the record* that either Equity or Shasta actively engaged in any commodity futures trading. No such expectation by *any* of Shasta's members is found in the record below.

## II. CERTIORARI IS APPROPRIATE AND NOW NECESSARY TO RESTORE CLARITY TO THE DETERMINATION OF WHAT ENTITIES MUST REGISTER AS COMMODITY POOL OPERATORS.

The Panel's "interpretation" of the statutory definition of CPO achieved its apparent "desired result" with respect to Equity and the other Petitioners but at the cost of creating far more than just a fourfold unnecessary conflict in the circuits. The Panel's peculiar interpretation of 7 U.S.C. § 1a(5) created unnecessary ambiguity and uncertainty for all district courts in the Third Circuit.

That unnecessary ambiguity and uncertainty arises from the obvious fact that different words have different meanings. The verb "invest" clearly has a different meaning than the verb "trade". The Panel held Shasta's manager Equity to be a CPO even though no actual trading by either Equity or Shasta ever occurred. The only activity of the entity managed by Equity was to place funds for periodic *investment* through its attorney with the trading entity Tech.

When are District Courts in the Third Circuit now supposed to conclude that a non-trading entity's manager is, nevertheless, a CPO under the Panel's "preferred" interpretation of the statute? What about entity "A" that *invests* in entity "B" that, in turn, *invests* in entity "C" that finally *does* "trade"? What if that "investment sequence" is carried *even further* to entity "D" and no actual trading occurs until funds reach entity "E"? Is entity A's manager also a "CPO"? If not, why not? What about the manager of entities "B" or "C"? How far down that chain of separate investing entities *that engage in no commodity futures trading whatsoever* must district courts in the Third Circuit now go before their appellate court is willing to concede that the act of "investing" is not

really the same as "trading" and that the manager of the investing entity in question is *not* a CPO?

The legacy of the Panel Opinion is inevitable confusion in the Third Circuit, direct conflict with the Ninth and arguable conflict with the Second Circuit as well--all the result of the Panel's inexplicable willingness to ignore a reality inadvertently confirmed in the CFTC's appellate brief: all commodity *pools* engage in the *trading of commodity futures contracts*. The second sentence of the first full paragraph on page 24 of the CFTC's appellate brief states:

> "The purpose of the pool must be to trade futures but the statutory definition of CPO does not require that the CPO itself handle *the pool's trading*."[11] (Emphasis added)

The Panel was also apparently willing to "overlook" *a second* CFTC appellate brief *faux pas*. On page 35 of that brief the CFTC confirmed that before the regulatory definition of "pool" was *narrowed* by the CFTC in 1981 [12] it specifically required *trading by the pool*:

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[11] Petitioners agree. Shimer and Firth's Motions were based upon the lack of a trading account in the name of the alleged pool entity Shasta–not a lack of trading by its alleged "operator" Equity.

[12] See Comm. Fut. L. Rep. (CCH) ¶21,188 at p. 24,891 (noted specifically by *Lopez*, supra at 884) where the CFTC's proposed revisions on August 4, 1980 to Part 4 Rules (45 FR § 1600) stated: "As proposed and as adopted, § 4.10(d) narrows the definition of the term "pool" by specifying that it is an entity 'operated for the purpose' of trading commodity interests."

> "Before 1981, the definition of "pool" covered "any investment trust, syndicate or similar form of enterprise *that trades* commodity interests." 44 Fed. Reg. 1918, 1924 (January 8, 1979) (emphasis added)."

It is not logical or reasonable to conclude that the *narrowing* of a previous regulatory definition that *required* trading by a "pool" would eliminate the requirement of trading in the current definition found at 17 C.F.R. § 4.10(d)(1) (see App. 63a). That is especially so in light of the very specific four part test of the *Lopez* Court that paid no attention *whatsoever* to that regulatory definition when it formulated its four part test.

The term commodity pool operator is a specific type of entity subject to very specific registration provisions enforced by a major federal regulatory agency. It is extremely important that clarity be restored to the question: what is a "commodity pool" when future district courts in the Third (and district courts in all other circuits but the Ninth) are asked to determine whether or not a specific entity is required to register under the CEA as a commodity pool "operator". The term commodity pool operator should not be allowed to remain under the cloud of extraordinary definitional confusion recently created by the Panel's untenable interpretation of 7 U.S.C. § 1a(5).

## III. CERTIORARI IS APPROPRIATE WHEN A FEDERAL APPELLATE OPINION RESULTS IN AN EXPANSION OF FEDERAL AGENCY ENFORCEMENT AUTHORITY NOT AUTHORIZED BY CONGRESS.

It is well settled that federal agencies only have such authority as has been conferred by their enabling statute. In *Manhattan General Equipment v. Commissioner of Internal Revenue* 297 U.S. 129, 134 (1936) this Court stated what continues to be a well settled principle:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, *for no such power can be delegated by Congress*... . A regulation which...operates to create a rule out of harmony with the statute, *is a mere nullity. Lynch v. Tilden Produce Co.*, 265 U.S. 315, 320—322, 44 S.Ct. 488, 68 L.Ed. 1034; *Miller v. United States*, 294 U.S. 435, 439, 440, 55 S.Ct. 440, 79 L.Ed. 977, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but *it must be reasonable.*" (Emphasis added)

Federal agencies such as the CFTC clearly "...may not extend a statute or modify its provisions." *Campbell v. Galeno Chemical Co.* 281 U.S. 599, 610 (1930). An unauthorized extension or modification of the CFTC's regulatory authority is no less a nullity when effected by a federal appellate decision that is

both unreasonable and inconsistent with the plain language of the CFTC's enabling statute. If Congress cannot "...delegate to the Courts or to any other tribunals, powers which are strictly and exclusively legislative..." *Wayman v. Southard* 23 U.S. 1, 42 (1825) cited with approval in *United States v. Grimaud* 220 U.S. 506, 517 (1911) clearly the Third Circuit Panel was without power or authority to exercise a legislative prerogative Congress is without power to confer.

Judicial decisions similar to the Panel Opinion that seek a particular preferred outcome at the expense of logic and commonsense and that also abandon or ignore clear, unequivocal prior case law precedent often invoke the law of unintended consequences. By effectively affirming the District Court's unwillingness to grant the summary judgment motions of Shimer and Firth the Third Circuit Panel Opinion sanctions an extension of CFTC authority to technically require CPO registration by any and all entities that may be similarly situated to Equity that manage entities that may *invest* in other entities that trade *but engage in absolutely no commodity futures trading whatsoever on their own.* Suddenly every entity that is merely *a member* of a commodity pool is now arguably required to either seek from the CFTC an exemption from registration or, in the absence of the grant of such an exemption, register as a commodity pool "operator" with the CFTC under the Third Circuit's interpretation of the statute. Those who fail to do so face the theoretical *possibility* of civil enforcement by that agency for non-registration!

Certiorari in the present matter is appropriate and should be granted because the failure of both the District Court and Appellate Court *to collectively engage in any responsible analysis of existing CFTC commodity pool operator related regulations* (App. 64a-81a) (when coupled with an unreasonable appellate court interpretation of the CFTC's enabling statute issued without the benefit of any responsible legislative history analysis) resulted in an extension of enforcement authority to the CFTC neither anticipated nor granted by Congress. The unreasonable interpretation given by the Third Circuit to the language of 7 U.S.C. § 1a(5) effected what the CFTC had no authority to accomplish on its own: an impermissible amendment of its enabling statute.

This Court granted certiorari when a federal agency exercised its regulatory authority and created a definition of adulterated butter in conflict with the definition found in the statute. See *Lynch v. Tilden Produce Co.*, supra. If it was appropriate to grant certiorari in *Lynch* to resolve both a conflict in the circuits and a conflict between the regulatory and statutory definition of the term "adulterated butter", how much more appropriate is it to grant certiorari when the conflict now created between both the Ninth and Second Circuits and the Third Circuit's interpretation of the statutory definition of CPO found at 7 U.S.C. § 1a(5) *purports to authorize the CFTC to enforce in the future the provisions of its enabling statute against apparently any non-trading investing entity that may be even farther removed than Petitioner Equity from the actual trading of commodity futures contracts!*

Whether both the integrity of the commodity futures markets (and *actual traders* of those markets) would be further protected by regulating entities such as Equity that manage entities that *do not* trade commodity futures is well within the ability of Congress to determine after an opportunity for the inevitable debate and public feedback that accompanies the legislative process.

## IV. THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS APPROPRIATE BECAUSE THE THIRD CIRCUIT PANEL DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED A SIMILAR DEPARTURE BY THE NEW JERSEY DISTRICT COURT.

Opinions of the district courts should always make sense and be a rational reflection or interpretation of existing federal statutes and prior case law. A district court decision issued without a sound basis in law erodes the public's confidence in the judicial process.

The District Court's stated reasons for denying Petitioner Shimer and Firth's two Motions were so lacking in sound reasoning and any basis in law the Third Circuit Court *never once* referred to any of those reasons in its July 13, 2009 Panel Opinion. (App. 3a-29a). A review of that Panel Opinion also reveals *not a single acknowledgement* that Shimer and Firth's *pro se* summary judgments motions ever existed!

That utter failure of the appellate court was never justified by any reference to *the general rule* that it is inappropriate for a circuit court of appeals to review a denial of summary judgment after an intervening trial on the merits. The application of that general rule by the various circuits is *almost always* justified by the existence in the record of sufficient factual ambiguity to present "genuine issues of material fact" more properly sorted out by the trier of fact at trial. See, for example, *Watson v. Amedco Steel, Incorporated* 29 F.3d 274, 277-78 (7th Cir. 1994) and cited cases noting at 278 that "...the denial of summary judgment typically becomes moot once the parties proceed to trial."

The proper application by the Panel of the four *Lopez* tests to the entity Shasta as a part of its review of the correctness of the District Court's denial of Shimer and Firth's summary judgment motions would *not* have resulted in redundant and unnecessary appellate review of issues of genuine material fact properly resolved at trial. The various factual issues purportedly "resolved" at trial *were all "immaterial" per Celotex Corp. if Shimer and Firth's pre-trial Motions were improperly denied!*

Both District Court Opinions (App. 32a-41a & App. 44a-52a) clearly recognize the importance of properly determining the "commodity pool" status of the entity Shasta for the summary judgment motions of Shimer and Firth and give lip service to *Lopez* yet reflect a petulant unwillingness to first engage in a rational analysis of the specific language contained in the four tests of *Lopez* and then apply that specific

language to the circumstances of the alleged pool entity Shasta.

Summary Judgment under Federal Rule 56(c) is *not* a discretionary remedy. In *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986) this Court stated that the standard to be applied "...mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)..." If the record reveals, as it does in the present case, an essential material fact missing from the non-moving party's case, all other facts alleged by the non-moving party Plaintiff are immaterial. Summary judgment *must* be granted *as a matter of law* per *Celotex Corp.*

The Panel refused to recognize the non-discretionary obligation of the District Court under Federal Rule 56(c). Such a refusal (given the unique circumstances of the present matter) is arguably a clear departure from the accepted and usual course of proceedings mandated by that Federal Rule. Summary judgment for Shimer and Firth in October of 2005 and again in November of 2006 was appropriate and should have been granted *as a matter of law* because the record was devoid of any evidence of a trading account and trading activity by the alleged pool entity Shasta-- a fact essential and material to the success *of every count* of the CFTC's Amended Complaint.

The *only connection* between all of the Petitioners and the CFTC's enforcement authority under the CEA is Equity's alleged status as a CPO. If Shasta is not a commodity pool, it is factually, logically and legally impossible for petitioner Equity

to be the "operator" of a commodity pool and *all connection* between the CEA and all of the Petitioners is severed. The unique circumstances of this case present an ideal opportunity for this Court to exercise its supervisory authority and remind the Third Circuit Court of the non discretionary nature of Rule 56(c). The non discretionary nature of that Federal Rule does not exist *only* for the benefit of those represented by outside legal counsel.

## V. THIS COURT HAS A LONG TRADITION OF GRANTING CERTIORARI TO PROTECT THE CONSTITUTIONAL RIGHTS TO BOTH DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

### A. The District Court's response to the *pro se* legal arguments of Shimer and Firth offered in support of two separate motions for summary judgment violated both their constitutional due process right to be heard and right to equal protection under the law.

Few would argue openly that *pro se* civil defendants have no right to be fully and fairly heard in the federal courts. Yet that has been the undeniable and consistent experience of the Petitioners for the past four years.

The fundamental "right to be heard" (so basic to the concept of due process itself) is the opportunity to be heard "...at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See also *United States v. Torres*, 383

F.3d 92, 103 & 104 (3d Cir. 2004) endorsing this basic principle by citing to *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

While it is true that concerns about due process arise more often in the context of deliberations that concern alleged criminal behavior, clearly the principle also applies in the civil context as well. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) *(Frankfurter, J., concurring).*

The District Court ignored and never acknowledged, mentioned or discussed *a single specific legal or fact based argument offered by Shimer in approximately 160 pages of pre-trial briefs filed in support of two separate proper motions for summary judgment extending over a period of more than two years.* Each specific *Lopez* argument and all other arguments offered by Shimer were repeatedly ignored and never mentioned. Shimer was twice "advised" that he was interpreting the otherwise clear and unequivocal language of the *Lopez* Court's fourth test "too literally". (See App. 41a and App. 52a).

If a district court can ignore and refuse to discuss in any meaningful manner a clear, well written and unambiguous prior appellate decision in another circuit by merely suggesting, in effect, that the appellate court "did not really mean what it said" such an approach does far more than place the entire

federal judiciary on a very slippery slope in which all predictability in the law is easily undermined. The repeatedly dismissive "attitude" of the District Court was a violation of Shimer and Firth's due process constitutional right to be reasonably heard.

Furthermore, in light of their obvious and continuing *pro se* status such an unnecessarily dismissive attitude should raise an equal protection concern as well. A *pro se* civil defendant's legitimate motion and argument under Rule 56(b) for summary judgment *must* be treated by the federal courts with the same respect, attention and consideration as any similar argument made on behalf of a civil defendant represented by retained legal counsel if that treatment is to survive constitutional scrutiny.

Petitioners are not proposing that the principle of equal protection and their right to due process necessarily obligates a district court to specifically address each and every argument of a *pro se* party if the court finds that party's analysis to be irrational, unsupported by the facts or deficient in some other way. Nor is due process violated if an alternative analysis contrary to the position of the *pro se* party is capable of withstanding *at least a modicum of rational scrutiny.*

But due process is not automatically satisfied merely because a district court judge exerts the effort necessary to apply pen to paper. The mere fact that a written opinion has been issued should not end an inquiry into whether a particular *pro se* defendant has been sufficiently "heard" to survive due process scrutiny.

If the District Court had provided Petitioners Shimer and Firth with anything *even approaching* a reasonable and rational analysis of why the four *Lopez* tests were in error or were not an accurate reflection of all prior "commodity pool" federal case law the due process right of Petitioners' "to be heard" would not have been violated. It is the lack of *any such analysis* coupled with the unwillingness of the District Court to fairly address the many reasonable *Lopez* related arguments offered by Shimer and Firth that justifies the necessary grant of this petition to defend the proposition that every *pro se* defendant has a clear and sacred constitutional right to be heard and to be heard in as respectful a manner as any civil defendant able to afford outside legal counsel.

**B. Given the unique threshold and potentially dispositive CEA issues of the present matter the failure of the Third Circuit Panel to engage in *any appellate review* of the correctness of the twice denial by the District Court of Shimer and Firth's separate *pro se* motions for summary judgment violated both their constitutional right to due process and equal protection under the law.**

When questions are presented to this Court about the due process sufficiency of appellate review afforded in state courts this Court has noted that "...the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of

their denial." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. 415, 430 (1994).

*Honda Motor Co., Ltd.* concluded at that same page 430 that

> "(w)hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *In re Winship*, 397 U.S., at 361, 90 S.Ct., at 1071."

The "absent procedure" in the present matter is the total lack of *any appellate review* of the correctness of the twice denial by the District Court of Shimer and Firth's separate *pro se* motions for summary judgment. Given the unique dispositive nature of the threshold summary judgment issue in the present case, that lack of appellate review by the Panel cannot be justified merely by the general rule (never cited by the Panel) that an intervening trial on remaining factual issues relieved the Panel of what should have been, *at least in the present case*, a *de novo* appellate responsibility to Petitioners.

As former Chief Justice Burger stated: "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the present

matter the "procedural protection" denied Petitioners was appellate review of the repeatedly and extensively argued threshold issue that was the primary subject and focus of their appeal--the correctness of the District Court's denial of Shimer and Firth's motions for summary judgment *dispositive of all counts* of the CFTC's Amended Complaint.

It is not necessary to spend any time in this petition speculating *why* the appellate court chose to completely ignore that *de novo* responsibility to the summary judgment motions of Shimer and Firth. It is enough that it did and sought refuge for that decision in an untenable interpretation of the statutory definition of CPO. Such behavior by the Panel was both arbitrary and unreasonable.

Any civil defendant subjected to arbitrary and unreasonable behavior by a federal judge or by a panel of federal circuit judges has been effectively denied that "process" which is every federal civil defendant's due. The combined behavior of both the District Court and the Panel in the present case highlights the importance of ensuring that the constitutionally required protection of due process is extended equally to *pro se* civil defendants.

A failure to grant this petition for certiorari would effectively deny the Petitioners Shimer and Firth for all time *any and all appellate review* of the merits of their claim to summary judgment with respect to all counts of the Amended Complaint under controlling summary judgment case law. That would be an egregious affront to the concepts of "rule

of law" "equal protection" and "due process" in light of the fact that before trial Shimer and Firth sought appellate review on February 9, 2007 of the District Court's twice denial of their Motions only to be effectively told that appellate review must wait *until after* a trial on the remaining issues. (App. 59a-60a)

Shimer and Firth's threshold summary judgment issue first "postponed" by a Third Circuit Panel on July 6, 2007 (App. 59a-60a) *was completely ignored* by a different Panel of that same Court two years later on July 13, 2009! Shimer and Firth's *pro se* status and the disdain shown again and again by both the District Court and the Appellate Court for otherwise legitimate legal arguments arguably raises equal protection concerns as well.

## CONCLUSION

The petition for a writ of certiorari should be granted for all of the reasons stated above.

Respectfully submitted,

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November 27, 2009

IN THE

# Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
***Petitioners,***

COMMODITY FUTURES TRADING COMMISSION
***Respondent***

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## APPENDIX VOLUME I

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Date: November 27, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. **08-1558, 08-1838, & 08-2495**

Commodity Futures Trading Commission
v.
Equity Financial Group LLC

**ORDER**

The appeals at Nos. 08-1558, 08-1838, and 08-2495 are hereby consolidated for purposes of scheduling and disposition. It is noted that Nos. 08-1558 and 08-1838 were consolidated for all purposes by Clerk's Order entered May 1, 2008. As the Court strongly disfavors repetitive briefs, Appellants are encouraged to file a consolidated brief or to join in or adopt portions of one another's briefs pursuant to Fed. R. App. P. 28(i). Appellees may file a consolidated brief, if they so choose.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: 5 June 2008

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 08-1558, 08-1838 & 08-2495

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COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.;
VINCENT J. FIRTH; ROBERT W. SHIMER;
J. VERNON ABERNETHY; COYT E. MURRAY;
MAGNUM CAPITAL INVESTMENTS, LTD.;
MAGNUM INVESTMENT, LTD;
TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

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On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

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Argued March 3, 2009

Before: SCIRICA, *Chief Judge*,
SLOVITER and HARDIMAN, *Circuit Judges*.

(Filed: July 13, 2009)

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OPINION OF THE COURT

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SCIRICA, *Chief Judge.*

This case involves a civil enforcement action under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, and related regulations. Defendants were charged with fraud under 7 U.S.C. §§ 6b and 6o and failing to register with the Commodity Futures Trading Commission, as required by 7 U.S.C. §§ 6m and 6k, among other counts. In a bench trial, the District Court concluded Equity Financial Group was regulated as a commodity pool operator, and it found defendants liable for fraudulent conduct, failing to register, and other violations. The principal issue on appeal is whether Equity Financial is a commodity pool operator under 7 U.S.C. § 1a(5), even though it operated a feeder fund—a fund that did not itself execute commodity futures transactions but invested in another fund for that purpose. We will affirm.

I.

Defendants are Equity Financial; Vincent Firth, Equity Financial's president and sole shareholder; and Robert Shimer, its lawyer. They created Shasta Capital Associates, an investment vehicle that raised funds from investors through the sale of member shares. Equity Financial and Shasta Capital were distinct legal entities, but Equity Financial was the manager of Shasta Capital, controlling the Shasta Capital funds. Defendants solicited more than $15 million into Shasta Capital to trade futures contracts. Equity Financial did not execute commodity futures transactions on behalf of Shasta Capital but it invested the Shasta Capital assets in another fund, Tech Traders,[1] which pooled

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[1]We use the name Tech Traders to refer to four entities that operated in concert: Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. The distinctions between these companies are irrelevant to this appeal. All four were named in the Amended Complaint along with Coyt E. Murray, the president, chief executive officer, or registered agent of the Tech Traders companies, and J. Vernon Abernathy, a certified public accountant who was retained by Murray and Tech Traders.

These companies, Murray, and Abernathy have settled with the agency and are not parties to this appeal. In a consent order, Tech Traders and Murray admitted to fraud in violation of 7 U.S.C. §§ 6b and 6*o*, failure to register as a commodity pool operator and commodity trading advisor in violation of 7 U.S.C. § 6m, and violating 17 C.F.R. § 4.30, applicable to commodity trading advisors, for trading client funds in its own accounts, among other violations. Tech Traders and Murray were enjoined from engaging in commodity trading and were ordered to pay nearly $18 million in restitution, more than $1.2 million in disgorgement, and more than $11 million in civil monetary

the Shasta Capital investment with other funds' investments, and executed transactions on behalf of the pool of funds. In this arrangement, Shasta Capital was a "feeder fund," and Tech Traders a "master pool" or "super fund."

Tech Traders and Coyt Murray, its president and chief executive officer, defrauded investors by misappropriating funds and falsely reporting Tech Traders's performance. [2] Defendants, Equity Financial, Firth, and Shimer, participated in the fraudulent conduct. They solicited and retained Shasta Capital investors by misrepresenting their qualifications and the performance of Shasta Capital's investments, and they took a portion of the invested funds for personal use through an arrangement with Murray that was not disclosed to investors.

Defendants made several false statements to investors, primarily in monthly and quarterly reports to investors and in Internet postings. They

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penalties. Under a separate consent order, Abernathy was found to have engaged in fraud in violation of 7 U.S.C. § 6*o*. He was enjoined from engaging in commodity futures markets, including accounting practices involving commodity futures. He was ordered to pay restitution, jointly and severally with other defendants, up to $5 million, and he was ordered to pay a civil monetary penalty of $300,000.

[2] As part of their settlement with the agency, Tech Traders and Murray admitted to violating 7 U.S.C. §§ 6b and 6*o* by fraudulently misrepresenting the performance of the Tech Traders fund.

represented that Shasta Capital was earning profits every month between June 2001 and February 2004, including double-digit rates of return in twenty-three of those thirty-three months.[3] But during this period, the Shasta Capital fund, which had invested solely in Tech Traders, was sustaining losses. Defendants' reports were based on information received from Tech Traders about Tech Traders's performance, but Firth and Shimer knew at least some of the Tech Traders reports were false or probably false. [4] Additionally, Shimer created a verification procedure that concealed the falsity of Tech Traders's reports. At Shimer's insistence, Tech Traders hired an accountant, J. Vernon Abernathy, who calculated and forwarded Tech Traders's false rate-of-return numbers to another accountant, Elaine Teague, hired by Shasta Capital. Teague relied on Abernathy's numbers in her own reports to defendants and in communications with Shasta Capital investors. But

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[3] Defendants reported returns of more than 130 percent from March 2003 to February 2004, 92 percent for the year 2003, and 108 percent for 2002. In the two worst-performing months between June 2001 and February 2004, they reported gains of 4.11 percent and 9.02 percent.

[4] In June 2002, Firth and Shimer learned Tech Traders's September 2001 report was false. In that month, relying on Tech Traders's reports, Shasta Capital reported a gain, but it actually suffered a loss. Neither Firth nor Shimer took any steps to correct the false September 2001 statements. Firth learned on at least three occasions that the value of Tech Traders's funds was less than the amount, based on Shasta Capital's own records, that Shasta Capital had invested with Tech Traders. These reports were inconsistent with the gains Shasta Capital was reporting to its investors and potential investors.

Shimer played a more direct role in the creation of Tech Traders's false reports. He invented the method Abernathy used to calculate Tech Traders's returns—a method that did not employ standard accounting practices and was misleading—and he helped Abernathy prepare many of the reports. Shimer also knew Abernathy lacked access to the records needed to calculate a proper rate of return. Apparently Teague was not aware of Shimer's involvement in the creation of the reports, the use of a nonstandard accounting procedure, or Abernathy's lack of access to necessary records. Teague accordingly provided a front to investors and potential investors, to verify the false reports.

Moreover, Firth and Shimer benefitted from an undisclosed arrangement with Murray and Tech Traders. Murray and Shimer had been involved in a prior business venture in which two other persons absconded with funds Shimer raised. Murray agreed to help Shimer repay the earlier investors if Shimer would solicit funds for Tech Traders. Under this agreement, Tech Traders would divert a portion of its "profits" back to Shimer through a trust called Shadetree in Nevis, West Indies.[5] Neither Firth nor Shimer disclosed the Shadetree agreement to Shasta Capital investors in statements or in Shasta

[5] Under the agreement, Shadetree would receive 5 percent of Tech Traders's operating fees and half of the profits Tech Traders would take after paying other fees, costs, and a premium to investors. Firth knew Shimer owed money to the prior investors, and he knew of the agreement between Shimer and Murray.

Capital's detailed Private Placement Memoranda.[6] Tech Traders paid $1,314,930 under the Shadetree agreement into accounts controlled by Shimer. Some of this money went to pay the earlier investors, some to pay a mortgage for Firth, and some to pay a referral fee to a former associate of Shimer.

The District Court concluded that Equity Financial was a commodity pool operator under 7 U.S.C. § 1a(5), and Firth and Shimer were statutorily defined associated persons of Equity

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[6] The Private Placement Memoranda, drafted by Shimer and approved and distributed by Firth, disclosed basic information about investing with Shasta Capital. Each Shasta Capital investor received one of these Private Placement Memoranda, depending on when he or she invested. The first Memorandum was distributed to investors during the time period between June 30, 2001, and February 18, 2003; the second between February 18, 2003, and September 2, 2003; the third between September 2, 2003, and April 1, 2004.

Only the first Memorandum made any mention of the Shadetree trust. It noted the trust would receive 5 percent of Tech Trader's operating costs. It did not, however, disclose that half of Tech Trader's profits would also be diverted to Shadetree.

In addition to omitting information about the Shadetree agreement between Shimer and Murray, the Private Placement Memoranda contained other misrepresentations or omissions about Shimer's and Firth's qualifications, business history, and the due diligence they claimed they conducted. The first of the three Private Placement Memoranda also included false information about Tech Traders's rate of return. Shimer calculated this rate, which was purportedly based on the return from another entity's Investments with Murray. Murray, however, would not verify this rate of return, and Shimer's calculations were not based on information that would allow him to calculate a proper rate of return.

Financial under 7 U.S.C. § 6k. It found Equity Financial liable under 7 U.S.C. § 6m for failing to register with the CFTC as a commodity pool operator, and Firth and Shimer liable under 7 U.S.C. § 6k for failing to register themselves as associated persons. The court concluded all three defendants had committed fraud under 7 U.S.C. §§ 6b and 6*o*.[7] Equity Financial, it held, was liable under 7 U.S.C. § 2(a)(1)(B) for Firth and Shimer's violations, and Firth and Shimer liable under 7 U.S.C. § 13c(b), as controlling persons of Equity Financial, for Equity Financial's violations, including its failure to register. Finally, the District Court concluded, Shimer is liable under 7 U.S.C. § 13c(a) for aiding and abetting Tech Traders's violation of 17 C.F.R. § 4.30. The court enjoined defendants from participating in commodity markets, and it ordered restitution, disgorgement of profits, and civil penalties. Defendants appeal from the judgment.[8]

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[7] In 2008, Congress amended § 6b in ways immaterial to this appeal. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 13102, 122 Stat. 1651, 2194–95. For the sake of simplicity, we refer to the pre-2008 version of the statute.

[8] We review the District Court's findings of fact for clear error, and we exercise plenary review over its interpretation of the law and its legal conclusions. *Am. Soc'y for Testing & Materials v. Corrpro Cos.*, 478 F.3d 557, 566 (3d Cir. 2007). The District Court had jurisdiction under 7 U.S.C. § 13a–1, and we have jurisdiction under 28 U.S.C. § 1291.

II

The Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, regulates the conduct of participants in commodity futures markets. These markets allow producers and purchasers of agricultural commodities and other products to hedge against the risk of future price movements caused by weather factors. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357–58 (1982). For example, a farmer may sell a commodity for future delivery to protect against a price decrease; a purchaser may want to buy a commodity for future delivery to protect against a price increase. *See id.* Because market prices for these futures contracts shift, the exchanges provide a profit opportunity for investors who buy and sell the contracts even though they do not intend to take delivery of the commodity. *Id.* at 357–59 & n.11. These investors trade in the belief the price will change favorably. *Id.* at 357. Enticed into the market by the profit opportunity, investors are "willing to assume the market risk that the hedging farmer or [agricultural commodity] processor wants to avoid." *Id.* at 358.

> . . . The speculators' participation in the market substantially enlarges the number of potential buyers and sellers of executory contracts and therefore makes it easier for farmers and processors to make firm commitments for future delivery at a fixed price. The liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place.

*Id.* The presence of investors in these markets tends to broaden the market, reduce price fluctuations, and spread risk. *Id.* At 358, 359 n.11. Without speculative investors, "the liquidity, so badly needed in futures markets, simply would not exist." *Id.* At 359 n.11 (*quoting* H.R. Rep. No. 93-975, at 138 (1974)). Although historically focused on agricultural commodities, participants in futures markets now exchange contracts for the future delivery of a range of assets. The CFTC has jurisdiction over certain futures contracts traded, for example, on designated contract markets. These include contracts for several listed agricultural commodities, 7 U.S.C. §§ 1a(4), 2(a)(1)(A); "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," *id.* §§ 1a(4), 2(a)(1)(A); and contracts of sale for future delivery of "a group or index of securities," *id.* § 2(a)(1)(C).[9]

Commodity pools, "the commodity-futures equivalent of a mutual fund," [10] facilitate the

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[9] Tech Traders traded futures contracts for the S&P 500 and NASDAQ 100 stock indices. It claimed it had developed special algorithms to identify trends in the market price of the futures contracts for these indices.

[10] *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986) ("A commodity pool is the commodity-futures equivalent of a mutual fund; the investor buys shares in the pool and the operator of the pool invests the proceeds in commodity futures."); *see also* 13 Jerry W. Markham, Commodities §17A-1 (2008) ("In its features, the typical commodity pool bears a strong resemblance to mutual funds and similar investment companies that have operated for decades in the securities industry.").

participation of investors in the market. They are vehicles through which investors can aggregate their funds, allowing a commodity pool operator to invest them for a fee. 13 Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims § 17A:1, at 17A-1 to 17A-2 (2008). The aggregation of funds also allows the pool, and by extension its participants, to hold a diversified portfolio and ensures individual investors will not have to take delivery of commodities. *Id.* at 17A-2 (*quoting* 1 Philip McBride Johnson & Thomas Lee Hazen, Derivatives Regulation § 1.11, at 1-251 (2004)). Typically the pool is organized in the form of a business entity that limits the liability of individual investors. *Id.* The amount of funds invested in commodity pools has grown immensely, from $75 million in 1976 to $600 billion in assets in 2005. *Id.* at 17A-2 & n.4.

III

As noted, Shasta Capital was a feeder fund that did not execute trades in its own name but instead invested its assets in the super fund Tech Traders. For this reason, defendants contend Equity Financial, Shasta Capital's manager, is not a commodity pool operator under the statutory definition in 7 U.S.C. § 1a(5).[11] We consider whether

[11] The statute defines "commodity pool operator" in § 1a(5) but does not define the term "commodity pool." The term "pool" is defined by regulation as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 C.F.R. § 4.10(d)(1). This regulation is not the basis for the agency's action in this case, and accordingly is not at issue in this appeal. *See infra* note 13.

the Act requires the commodity pool operator to trade commodity futures contracts in its own name and whether Equity Financial is a commodity pool operator under the definition in § 1a(5).

A

A commodity pool operator is defined in 7 U.S.C. § 1a(5) as

> any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility . . . .

7 U.S.C. § 1a(5). A commodity pool operator must engage in a business of a particular form; it must solicit, accept, or receive funds, securities, or property; and the solicitation must have a particular purpose—trading commodity futures. The solicitation, acceptance, or receipt of funds must be "for the purpose of trading," but nothing in the statute imposes an actual trading requirement. The plain language of § 1a(5) requires only that the entity be engaged in a business of the proper

form, and it solicit, accept, or receive funds for the purpose of trading.[12]

The absence of a trading requirement is consistent with the purposes of the statutory scheme.[13] The Commodity Act is intended to deter

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[12] Highlighting the lack of an explicit trading requirement in § 1a(5), the statute defines other market participants' roles in ways more obviously associated with trading. Floor brokers and floor traders are defined as persons who purchase or sell commodities for future delivery. 7 U.S.C. § 1a(16), (17). Future commission merchants and introducing brokers are persons who solicit or accept orders for the purchase or sale of commodities for future delivery. *Id.* § 1a(20), (23); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 359 (1982) ("[F]utures commission merchants . . . solicit orders from individual traders, and . . . floor brokers . . . make the actual trades on the floor of the exchange on behalf of futures commission merchants and their customers."). Within the statutory classification, these roles differ from that of the commodity pool operator. The language in § 1a(5) neither requires a commodity pool operator to "purchase or sell" futures contracts, as floor brokers and traders do, nor does it require it to place orders, the conduct complementary to that of a futures commission merchant and introducing broker.

The definition of associated persons of commodity pool operators in 7 U.S.C. § 6k emphasizes that solicitation of funds, not trading, is the conduct in which the commodity pool operator must engage. That provision only requires registration of persons involved in the solicitation of funds or the supervision of those who solicit funds.

[13] We do not decide whether the agency's regulations defining and regulating pools deserve deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The agency has asserted that "it is unnecessary for the Court to apply a *Chevron* . . . analysis in this appeal." (Br. Of Appellee at 34 n.12.) We note, however, that the regulations

and prevent ...disruptions to market integrity" and "protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets." 7 U.S.C. § 5(b). The specific provisions governing commodity pool operators are directed toward regulating activities involving the solicitation of funds. "Commodity pool operator" was first defined in the 1974 Act, and testimony included in the House of Representatives Report accompanying that bill addressed the purposes of the new provisions:

> One of the ways in which unsophisticated traders have lost substantial amounts of money is through commodity advisors and commodity pool operators. This bill will provide for the registration of all such persons, establish procedures under which they will be

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appear to comport with the interpretation we give the statute. Unlike the statute, the regulations define a pool. The regulations do not include a trading requirement, defining a pool as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 C.F.R. § 4.10(d)(1).

The regulations also cover pools that invest in other pools. The regulations define an "investee pool" as "any pool in which another pool or account participates or invests, *e.g.*, as a limited partner thereof." *Id.* § 4.10(d)(4). A commodity pool operator must disclose the performance of investee pools in which its pool invests. *Id.* § 4.25(c)(4), (c)(5). And the regulations cover those "investor fund commodity pool operators" that do no trading of their own but invest all funds in an investee fund. *See* 17 C.F.R. Part 4 app. A (providing guidance to a commodity pool operator that "allocates the fund's assets to one or more investee funds").

> permitted to operate and specifically eliminate certain undesirable practices which have enticed unsuspecting traders into the markets with, far too often, substantial loss of funds.

H.R. Rep. No. 93-975, at 79 (1974) (statement of Dr. Clayton Yeutter, Assistant Secretary of Agriculture). [14] Accordingly, when Congress defined commodity pool operator, it sought to regulate the solicitation of funds from customers and potential customers. And it intended to protect them from harmful conduct, especially fraudulent solicitation. The statute would be undermined if one entity could escape regulation merely by having another execute its trades.

Defendants contend we should follow *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986), which, they maintain, imposes a trading requirement. Specifically, *Lopez* describes a commodity pool as

> (1) an investment organization in which the funds of various investors are solicited and combined into a single

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[14]The 1936 Act, though not defining commodity pool operators, had similar aims. The Senate Report accompanying the 1936 Act suggested that Act would "more adequately" address "[c]ertain trade practices involving the cheating of customers." S. Rep. No. 74-1431, at 3 (1935). "Clearly Congress has recognized through the years that fraudulent and deceptive conduct in connection with futures transactions can and does occur prior to the actual opening of a trading account . . . ." *Hirk v. Agri-Res. Council, Inc.*, 561 F.2d 96, 104 (7th Cir. 1977) (construing the language of 7 U.S.C. § 6b in light of the legislative history accompanying the 1936 and 1974 Acts).

> account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the *entire* account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of an individual investor.

805 F.2d at 884. Under this definition, defendants contend a person must trade in commodity futures to be a commodity pool operator. *Lopez*, however, is distinguishable: Dean Witter traded the funds at issue from its own account. *Id.* at 882 n.2. The legal question was whether the Dean Witter investment vehicle was an entity of the proper form—"a business of the nature of an investment trust, syndicate, or similar form of enterprise"—despite the lack of pro-rata sharing of profits and losses. *Id.* at 883–84. The *Lopez* court confronted different facts and a different legal question. It did not address whether a commodity pool operator must itself execute commodity futures transactions.

In conclusion, the statute does not require a commodity pool operator to execute commodity futures transactions. The language of the definition lacks an explicit trading requirement, and the remedial purposes of the statute would be thwarted if the operator of a fund could avoid the regulatory scheme simply by investing in another pool rather

than trading. If an entity is engaged in a business in the nature of an investment trust, syndicate, or similar form of enterprise, and it solicits, accepts, or receives funds for the purpose of trading, it is a commodity pool operator. The actual trading of commodity futures is not required.

B

Under 7 U.S.C. § 1a(5), Equity Financial, as the manager of Shasta Capital, is a commodity pool operator. A commodity pool operator must be "engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise." 7 U.S.C. § 1a(5). A business takes this form when it provides a vehicle for a collective or group investment. *Lopez* aides our understanding of this provision. A business falls within this category when it combines investor funds into a single, commingled account; participants share pro rata in any profits and losses; and funds are invested or traded collectively, on behalf of the entire account, rather than in the name of individual investors. *See Lopez.*, 805 F.2d at 884; *supra* Part III.A. In *Lopez*, Dean Witter assigned each investor an individual account number, and not all investors' funds were used in each trade. 805 F.2d at 882 n.2. Because "not all accounts shared a pro rata profit or loss," the Dean Witter investment vehicle was not a commodity pool operator. *Id.* At 884. In this case, defendants collected all investor funds in Shimer's attorney escrow account, and Shimer transferred the commingled funds from his account to Tech Traders. Tech Traders held Shasta Capital's funds in Shasta

Capital's name, not in the names of Shasta Capital's investors. Under the Private Placement Memoranda, the Shasta Capital investors shared profits and losses on a pro-rata basis. Shasta Capital was accordingly a vehicle for collective, group investment. Because Equity Financial was the manager of Shasta Capital, it was engaged in a business "of the nature of an investment trust, syndicate, or similar form of enterprise."

A commodity pool operator also must "solicit[], accept[], or receive[] . . . funds . . . for the purpose of trading in any commodity for future delivery." 7 U.S.C. § 1a(5). Firth and Shimer, acting individually and through Equity Financial, solicited funds for Shasta Capital. Shimer drafted the Private Placement Memoranda, and Firth approved these documents and distributed them to potential customers. Equity Financial, Firth, and Shimer advertised the Shasta Capital fund on the Internet. As a result of these efforts, they received more than $15 million into Shasta Capital. According to the terms of a 2001 investment agreement with Tech Traders and the Private Placement Memoranda, the funds were to be invested with Tech Traders for the purpose of trading futures contracts.

Accordingly, the form of the Shasta Capital enterprise and Equity Financial's solicitation and receipt of funds for the purpose of trading futures contracts place Equity Financial squarely within the definition of a commodity pool operator.

## IV

Defendants challenge the District Court's conclusion that they committed fraud under 7 U.S.C. §§ 6b and 6*o*.[15] Specifically, they contend the evidence does not

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[15] As a commodity pool operator, Equity Financial is regulated by § 6*o*, which also governs conduct by Firth and Shimer, who are statutorily defined associated persons of Equity Financial. *See* 7 U.S.C. § 6k (requiring registration of persons associated with a commodity pool operator as a "partner, officer, employee, consultant, or agent . . . in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person" so engaged). According to § 6*o*,

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator
> ...
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6*o*. The District Court concluded the defendants violated this antifraud provision as well as the antifraud provision in § 6b. Section 6b regulates "any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, for or on behalf of any other person." 7 U.S.C. § 6b(a)(2) (2006). Defendants do not meaningfully challenge the applicability of § 6b to them. "[A]ppellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." *Kost v.*

support a finding of scienter.[16] Scienter is an "intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), and it may be shown either by conscious behavior or recklessness. *See Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988); *First Commodity Corp. of Boston v. CFTC*, 676 F.2d 1, 6–7 (1st Cir. 1982) (concluding a reckless misrepresentation suffices, "one that departs so far from the standards of ordinary care that it is very difficult to believe the

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*Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). Defendants failed to present a proper argument.

[16] There are different views about whether the antifraud provision in 7 U.S.C. § 6*o*(1)(A) includes a scienter requirement. *Compare First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1341–42 (6th Cir. 1987) ("[Section 6*o*] does not contain the same scienter requirement as § [6b]. .. . [T]he complainant need prove only that the commodity trading advisor intentionally made the statements complained of, and not that the advisor acted with the intent to defraud."), *and CFTC v. Savage*, 611 F.2d 270, 285 (9th Cir. 1979) (concluding a violation of § 6*o*(1) only requires the intent to "employ the 'device, scheme, or artifice'"), *with Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677–80 (11th Cir. 1988) ("[W]e conclude that Section 6*o*(1)(A) contains the same *scienter* requirement as Section 10(b) and Rule 10b–5 of the federal securities laws, while Section 6*o*(1)(B) does not require proof of *scienter*."). Because we conclude defendants' conduct in this case demonstrates scienter, we do not also decide whether some other culpability standard would also suffice.

speaker was not aware of what he was doing"); *cf. Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 267 & n.42 (3d Cir. 2009) (noting that under federal securities law, either reckless or conscious behavior suffices).[17]

Firth and Shimer both knew or recklessly disregarded an obvious risk that Abernathy's reports were false. Both Firth and Shimer learned in 2002 of at least one report, the September 2001 report, that was false. Additionally, Firth learned on at least three occasions that Tech Traders did not have as much money in its accounts as the Shasta Capital records reflected. Defendants nonetheless continued reporting Abernathy's performance results as Shasta Capital's own performance results. Shimer knew Abernathy did not have access to the records he would need to calculate a rate of return. He nonetheless created a system to communicate Abernathy's false reports to investors and potential investors in a way that would appear to be credible, verified by two certified public accountants. Furthermore, Shimer was a party to and Firth knew of the Shadetree agreement, which was not disclosed

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[17] "The language of [7 U.S.C. § 6b] is similar to that of § 10(b) of the Securities Exchange Act of 1934 . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 389 n.88 (1982). "A reckless statement is one involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 535 (3d Cir. 1999) (internal quotation marks omitted) (interpreting scienter in the context of federal securities law).

to investors, and which diverted funds into accounts controlled by Shimer. In light of their knowledge of the falsity of their statements and disclosures, these misrepresentations suffice to show Firth and Shimer acted with scienter.

V

Firth and Shimer challenge the District Court's conclusion that they are liable as controlling persons for Equity Financial's failure to register with the agency.[18] Any person "who, directly or indirectly, controls any person who has violated any provision of this chapter" is liable for the controlled person's violation if he "did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." 7 U.S.C. § 13c(b). Here, defendants continued operating the Shasta Capital fund without registering, despite knowing Equity Financial was in violation of the registration requirement. In the fall of 2003, two potential Shasta

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[18] If commodity pool operators use the mails or any means or instrumentality of interstate commerce, they must register with the agency under 7 U.S.C. §§ 6m and 6n. Equity Financial violated this provision because it was a commodity pool operator engaged in interstate commerce and did not register.

In addition to concluding Firth and Shimer were secondarily liable as controlling persons for Equity Financial's failure to register, 7 U.S.C. § 13c(b), the District Court concluded Shimer was secondarily liable for the same violation under the aiding and abetting provision, 7 U.S.C. § 13c(a). It is not clear whether Shimer appeals this latter holding. But if so, his brief contains no argument to this matter, and accordingly he has waived it. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

Capital investors contacted Firth and Shimer, telling them the CFTC believed registration was necessary. In light of this information, Firth and Shimer hired a law firm in October 2003 to consider Equity Financial's registration requirements. Disagreeing with Shimer's own legal analysis, the law firm believed the failure to register subjected the operation to legal action by the CFTC.[19] The law firm repeated its opinion in a December 2003 letter, and encouraged Firth and Shimer to approach the CFTC, along with Tech Traders, to cure the defects. If Tech Traders would not also register, the law firm suggested defendants would have to end their relationship with Tech Traders. Defendants, despite knowing by this time that the CFTC was investigating Shasta Capital and that Shasta Capital was not in compliance with the registration requirement, wanted to continue the relationship with Tech Traders and Murray. "[S]o long as the numbers were still there," stated Shimer, nobody wanted to jeopardize the relationship. Despite learning about the registration requirement in October 2003, Firth and Shimer continued to solicit investments into the unregistered Shasta Capital fund, and took in more than $8.5 million between November 2003 and April 2004. Firth and Shimer knew about the registration requirement and continued to operate the fund without registering. The failure to register was not a result of a good faith belief that Equity Financial did not need to register

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[19] The law firm was not privy to information that would have revealed the fraudulent conduct.

but because "the numbers were still there," numbers that furthered the fraudulent scheme.

## VI

The District Court concluded Shimer aided and abetted Tech Traders's violation of 17 C.F.R. § 4.30. Section 4.30 prohibits a commodity trading advisor from soliciting, accepting, or receiving client funds to purchase, margin, guarantee or secure commodity future interests of the client.[20] Shimer contends Tech Traders was not a commodity trading advisor because Shasta Capital neither traded commodity futures in its own name nor intended to do so. A commodity trading advisor is any person who (i) "for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability" of trading in any commodity for future delivery or (ii) "for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports" concerning such activities. 7 U.S.C. § 1a(6). This definition focuses on the conduct of the commodity trading advisor—Tech Traders in this case. Shasta Capital's choice to invest in the Tech Traders fund

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[20] In this relationship, Tech Traders was the commodity trading advisor and Shasta Capital was its client. Tech Traders violated 17 C.F.R. § 4.30 by receiving Shasta Capital funds and using them to trade commodity future interests. Had Tech Traders established a separate fund to serve as a commodity pool, it could have acted as both a commodity pool operator and a commodity trading advisor without violating § 4.30. Accepting and trading the funds itself rather than establishing a distinct entity ran afoul of the regulation.

rather than trade in its own name is irrelevant to Tech Traders's status under this definition.

Additionally, Shimer contends he is not liable because he did not have the requisite mental state under 7 U.S.C. § 13c(a), the aiding and abetting provision of the Act. Section 13c(a) establishes liability for a person who "willfully aids, abets, counsels, commands, induces, or procures the commission of" a violation of the rules, regulations, or orders promulgated under the Act; "acts in combination or concert with any other person in any such violation;" or "willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation." 7 U.S.C. § 13c(a). Shimer's actions meet the standard. He drafted a 2001 investment agreement between Tech Traders and Shasta Capital. Under the agreement, Tech Traders received Shasta Capital funds for the purpose of trading commodity future interests in Tech Trader's name. Shimer transferred Shasta Capital funds from his attorney escrow account to Tech Traders for that purpose, and he continued doing so after being advised by his law firm in October 2003 that Tech Traders could not trade Shasta Capital funds from Tech Traders's account. At least for the period after October 2003, Shimer's conduct suffices to establish his liability for aiding and abetting Tech Traders's violation.[21]

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[21] Shimer also challenges the District Court's determination by claiming Shasta Capital did not seek or obtain a commodity interest. The evidence, however, amply demonstrates Shimer's conduct furthered the relationship between Shasta Capital and

## VII

For the foregoing reasons, we will affirm the judgment of the District Court.

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Tech Traders in which Tech Traders received Shasta Capital funds to "purchase, margin, guarantee or secure" commodity interests. *See* 17 U.S.C. § 4.30.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 08-1558, 08-1838 & 08-2495

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COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.; VINCENT J. FIRTH
ROBERT W. SHIMER; J. VERNON ABERNETHY;
COYT E. MURRAY; MAGNUM CAPITAL
INVESTMENTS, LTD.; MAGNUM INVESTMENT,
LTD; TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

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On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

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Argued March 3, 2009
Before: SCIRICA, *Chief Judge*, SLOVITER and
HARDIMAN, *Circuit Judges*

## JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 3, 2009. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 6, 2006, 2008, and the amended judgment of the District Court entered June 10, 2008, be, and the same are hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 13 July 2009

Costs Taxed in Favor of Commodity Futures Trading Commission as follows:

Total for Brief ....$418.32

Total .....$418.32

NOT FOR PUBLICATION (Docket Nos. 159, 160, 167, 189, 230, 231)

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE**

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

EQUITY FINANCIAL GROUP, LLC, et. al.,
Defendants.

**KUGLER**, United States District Judge:

Before the Court are motions by Defendants Robert W. Shimer, Vincent J. Firth, and Equity Financial Group, LLC, to dismiss the Counts against them in Plaintiff Commodity Futures Trading Commission's First Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b) (1) or for failure to state a claim under Rule 12(b) (6). Also before the Court is Defendants' motion for summary judgment. For the reasons provided below, Defendants' motions will be denied in their entirety.

## I. Background

The motions presently before the Court relate to the role of Robert W. Shimer ("Shimer"), Vincent J. Firth ("Firth"), and Equity Financial Group, LLC ("Equity"), collectively "Equity Defendants"), in a multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over $47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns. While Tech Traders and its supposedly independent certified public accountant (CPA), Defendant J. Vernon Abernethy, reported substantial monthly and quarterly gains, Tech Traders was actually hemorrhaging money at a remarkable rate, resulting in losses in excess of $20 million. Tech Traders lost at least $7 million in trading commodity futures contracts, and unlawfully appropriated investors' funds to pay salaries, expenses, and make disbursements under the guise of profit.

The Equity Defendants' liability arises from their control and operation of a related investment group, Shasta Capital Associates, LLC ("Shasta"), which was essentially a feeder fund for Tech Traders. The Commodity Futures Trading Commission ("CFTC" or "Plaintiff") alleges that the Equity Defendants solicited approximately $15 million from 74 investors between June 2001 and March 2004, for the purpose of investing in Tech Traders. Shasta's Private Placement Memorandum informed investors

that 99% of this money would be invested for the benefit of Shasta and 1% would be used for management costs. Upon receipt, investor funds were deposited into Shimer's attorney escrow account and then transmitted to Tech Traders. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts.

Over the course of their relationship with Tech Traders, the Equity Defendants reported tremendous trading profits, even though Shasta was actually losing substantial sums through Tech Traders and apparently failed to generate any profit whatsoever. The Equity Defendants further misled investors by representing that these profit numbers were verified by an independent CPA, Defendant Abernethy, whose results were then affirmed by a second CPA. The CFTC alleges that the Equity Defendants knew or should have known that neither CPA's review was independent and that the results were therefore unverified.

Shimer, representing himself pro se, filed a motion to dismiss for failure to state a claim, a motion to dismiss for lack of jurisdiction, and a motion for summary judgment on April 14, 2005. Firth joined Shimer's motions on April 15, 2005, and Equity joined on April 28, 2005.[1] The motion for

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[1] On May 13, 2005, Shimer sent, but did not electronically file, a letter to the Court requesting the Court extend his motion to dismiss to encompass Count V of Plaintiff's First Amended Complaint. Because Shimer failed to follow the proper

summary judgment was dismissed without prejudice, pursuant to a status conference with Magistrate Judge Ann Marie Donio. Shimer and Firth later refilled motions for summary judgment on July 8, 2005.

## II. Discussion

### A. Standard

Although the Equity Defendants have filed three separate motions, each motion uses essentially the same arguments to dispute the same point: whether Shasta is a "commodity pool" for the purposes of CFTC jurisdiction.[2] Because the parties' dispute is essentially one of law, founded on solely legal arguments, the standard this Court applies in resolving the dispute is of little import. Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b) (6) motion

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procedure for amending motions under Local Rule 7.1, and because this Court now finds that Shimer's motion to dismiss has no merit, this Court will not consider Shimer's letter.

[2] Defendants spend over 170 pages of briefing belaboring this point in what can only be characterized as an abuse of the judicial process. Shimer's initial brief is approximately 92 pages, well in excess of the 40 pages authorized by Local Rule 7.2(b). Pursuant to a letter filed February 11, 2005, Shimer requested that the Court make an exception to this rule and permit his brief to stand. This Court will permit Shimer's overlong motion to stand, however, further failures to comply with the Local Rules will not be permitted

and a motion for summary judgment.").[3] Accordingly, this Court will assess the merits of Defendants' argument through the lens of the summary judgment standard.

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for

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[3] Dismissal under Rule 12(b) (1) is appropriate only if the court lacks subject matter jurisdiction over the suit. A district court has jurisdiction where a well-pleaded complaint establishes that plaintiff's right to relief depends on resolution of a substantial question of federal law. See e.g. Franchise Tax Bd. Of State of Cal. V. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 10 (U.S. 1983). If the Plaintiff pleads a federal cause of action, the court should dismiss for lack of subject matter jurisdiction only where the claims are "so attenuated and unsubstantial as to be absolutely devoid of merit." Murrow v. Clifford, 502 F.2d 1066, 1068 (3d Cir. 1974). Because plaintiff CFTC's claims are neither frivolous nor devoid of merit, this Court has jurisdiction over the present suit. Accordingly, Defendants' motion to dismiss for lack of jurisdiction under 12 (b) (1) will be denied.

summary judgment must be denied. Id. at 332.

**B. Commodity Pool**

Congress amended the Commodity Exchange Act and established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid(e) a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Congo 2d Sess., reprinted in [1974] u.s. Code Congo & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool and is therefore exempt from the jurisdiction of the CFTC.[4]

For the purpose of the Commodity Exchange Act, "(p)ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10(d)(1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

> any person engaged in a business that is of the nature an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or

[4] Plaintiff asserts that Defendants need not be a commodity pool for the purpose of Count I and Count V of the First Amended Complaint. Because this Court finds that Shasta is a commodity pool, it does not reach the merits of the CFTC's argument.

> property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

Pub L. No. 102-546, 106 Stat 3590 (1992).

A commodity pool is distinguished from other investment entities by the aggregation of investor funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a

commodity pool, all investors' funds are placed in a single account. Transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors were pooled in

Defendant Shimer's equity account; (2) these comingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶ 21,627, p. 26,384 (N.D. Ill.1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account [5] where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held that because investors expected to share profits and losses on a pro rata basis, the enterprise was a commodity pool,

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[5] Defendants in Heritage actually deposited funds into two different accounts, both of which contained the conmingled funds of a variety of customers.

regardless of the fact that it was a third party who conducted the actual investment activities. Id.

Defendants go to great lengths to argue that because the Shasta funds were not traded "in the name of Shasta" Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is far too literal. The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account. The appellation given the actual transaction is irrelevant, so long as it is a pooled fund and not conducted in the names of individual customer accounts. See In re Slusser, 1998 WL 537342 at n.36 (holding that entities at issue were commodity pools even though "[t]he pools were not traded in the name of the pool... [t]he key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). This pooling is clearly present here.

Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool. Accordingly, Defendants motions will be denied.

The accompanying order will issue today.

Dated: 10-4-05

/s/Robert B. Kugler
Robert B. Kugler
United States District Judge

(Docket Nos. 159, 160, 167, 189, 230, 231)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v. **ORDER**

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

This matter having come before the Court on Defendants' Robert W. Shimer, Vincent J. Firth, and Equity Financial Group, LLC ("Defendants"), Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b) (1) and 12(b) (6), Defendants' Motion for Summary Judgment, and Defendant Shimer's motion to allow a previously filed overlong brief to stand; and the Court having considered the moving papers, and the opposition thereto; and for the reasons expressed in the Opinion issued this date;

IT IS hereby **ORDERED** that Defendant Shimer's motion to allow a previously filed overlong brief to stand [189] is **GRANTED;**

IT IS further ORDERED that Defendants' remaining motions (159, 160,167, 230, 231) are DENIED.

Dated: 10-4-05

/s/ Robert B. Kugler
Robert B. Kulger
United States District Judge

NOT FOR PUBLICATION (Docket Nos. 334, 335)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

**OPINION**

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

**KUGLER**, United States District Judge:

Before the Court are motions by Defendants Robert W. Shimer and Vincent J. Firth for summary judgment with respect to all counts in Plaintiff Commodity Futures Trading Commission's First Amended Complaint, pursuant to Federal Rule of Civil Procedure 56(b). For the reasons provided below, Defendants' motions will be denied.

## I. Background

The motions presently before the Court relate to the role of Robert W. Shimer ("Shimer"), Vincent J. Firth ("Firth"), and Equity Financial Group, LLC

("Equity"), (collectively "Equity Defendants"), in a multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over $47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns. While Tech Traders and its supposedly independent certified public accountant ("CPA"), Defendant J. Vernon Abernethy, reported substantial monthly and quarterly gains, Tech Traders was actually hemorrhaging money at a remarkable rate, resulting in losses in excess of $20 million. Tech Traders lost at least $7 million in trading commodity futures contracts, and unlawfully appropriated investors' funds to pay salaries, expenses, and make disbursements under the guise of profit.

The Equity Defendants' liability arises from their control and operation of a related investment group, Shasta Capital Associates, LLC ("Shasta"), which was essentially a feeder fund for Tech Traders. The Commodity Futures Trading Commission ("CFTC" or "Plaintiff") alleges that the Equity Defendants solicited approximately $15 million from 74 investors between June 2001 and March 2004, for the purpose of investing in Tech Traders. Shasta's Private Placement Memorandum informed investors that 99% of this money would be invested for the benefit of Shasta and 1% would be used for management costs. Upon receipt, investor funds were deposited into Shimer's attorney escrow

account and then transmitted to Tech Traders. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts.

Over the course of their relationship with Tech Traders, the Equity Defendants reported tremendous trading profits, even though Shasta was actually losing substantial sums through Tech Traders and apparently failed to generate any profit whatsoever. The Equity Defendants further misled investors by representing that these profit numbers were verified by an independent CPA, Defendant Abernethy, whose results were then affirmed by a second CPA. The CFTC alleges that the Equity Defendants knew or should have known that neither CPA's review was independent and that the results were therefore unverified.

Shimer and Firth, representing themselves pro se, each filed motions for summary judgment on April 7, 2006.

## II. Discussion

### A. Standard

Although the Equity Defendants have filed three separate motions, each motion uses essentially the same arguments to dispute counts one, two, three, four and five in Plaintiff's Amended Complaint: that Plaintiff cannot establish that Shasta is a "commodity pool" which is a material fact

necessary to bring this action within the ambit of the Commodities exchange Act ("CEA").[1]

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for summary judgment must be denied. Id. at 332.

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[1] Defendants asserted the same arguments in motions to dismiss filed on April 14, 2005. In denying those motions, this Court used the summary judgment standard. The Court stated that "because the parties' dispute [wa]s essentially one of law, founded on solely legal arguments, the standard this Court applie[d] in resolving the dispute [wa]s of little import." Commodity Futures Trading Comm'n v. Eguity Financial Group, LLC, et al., No. 04-1512, 2005 WL 2864784, at *2 (D.N.J. Oct. 4, 2005) (citing Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b) (6) motion and a motion for summary judgment.")). Therefore, in denying Defendants' motions for summary judgment, this Court uses the same analysis used in its Opinion of October 4, 2005.

## B. Commodity Pool

Congress amended the Commodity Exchange Act and established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid(e) a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Congo 2d Sess., reprinted in [1974] u.s. Code Congo & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool. Therefore, Defendants argue that because Plaintiff cannot establish that Shasta is a commodity pool under the CEA, Plaintiffs likewise cannot establish all the elements of the five counts asserted in the Complaint.

For the purpose of the CEA, "(p)ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10(d)(1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

> any person engaged in a business that is of the nature an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of

> trading in any commodity for future delivery on or subject to the rules of any contract market.

Pub L. No. 102-546, 106 Stat 3590 (1992).

A commodity pool is distinguished from other investment entities by the aggregation of investor funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a commodity pool, all investors' funds are placed in a

single account. Transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors were pooled in Defendant Shimer's equity account; (2) these

comingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶21,627, p. 26,384 (N.D. Ill. 1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account [2] where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held that because investors expected to share profits and losses on a pro rata basis, the enterprise was a commodity pool, regardless of the fact that it was a third party who

[2] Defendants in Heritage actually deposited funds into two different accounts, both of which contained the commingled funds of a variety of customers.

conducted the actual investment activities. Id.

Defendants go to great lengths to argue that because the Shasta funds were not traded "in the name of Shasta" Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is far too literal. The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account. The appellation given the actual transaction is irrelevant, so long as it is a pooled fund and not conducted in the names of individual customer accounts. See In re Slusser, 1998 WL 537342 at n.36 (holding that entities at issue were commodity pools even though "[t]he pools were not traded in the name of the pool... [t]he key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). This pooling is clearly present here.

Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool. Accordingly, Defendants motions will be denied.

Dated: 11-16-2006

/s/Robert B. Kugler
Robert B. Kugler
United States District Judge

(Docket Nos. 334, 335)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

**ORDER**

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

This matter having come before the Court upon motions for summary judgment by Defendants Vincent J. Firth and Robert W. Shimer; and the Court having considered the moving papers and the opposition thereto; and for reasons expressed in the Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motions fort Summary Judgment are DENIED.

Dated: 11/16/2006

/s/ Robert B. Kugler
Robert B. Kugler
United States District Judge

NOT FOR PUBLICATION (Docket No. 336)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC, et. al.,
Defendants.

Civil No. 04-1512 (RBK)

**OPINION**

**KUGLER**, United States District Judge:

Before the Court is a motion by Plaintiff Commodity Futures Trading Commission for partial summary judgment against Defendants Equity Financial Group, Robert W. Shimer and Vincent J. Firth with respect to charges that they violated 7 U.S.C. §§ 6k(2), 6m, and 6*o*(1) of the Commodities Exchange Act, pursuant to Federal Rule of Civil Procedure 56. In addition, Plaintiff moves for summary judgment with respect to the charge that Defendant Shimer aided and abetted Equity's § 6m violation and Tech Traders' violation of 17 C.F.R. §4.30. For the reasons provided below, Plaintiff's motion will be granted in part and denied in part.

"make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Serbin, 96 F.3d at 69 n.2 (quoting Celotex, 477 U.S. at 322); Heffron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562, 568-69 (D.N.J. 2003).

**B. 7 U.S.C. § 6m(1)**

Plaintiff CFTC alleges that because Equity failed to register with the CFTC as a Commodity Pool Operator ("CPO"), Equity violated 7 U.S.C. §6m(1) when it allegedly used instrumentalities of interstate commerce, such as the telephone and the mail, in connection with its business as a CPO. Equity Defendants do not directly address this count in their opposition papers.[1] Rather, they continue to insist that Shasta is not a commodity pool," the threshold issue for bringing this action under the jurisdiction of the CFTC.

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[1] In fact, Defendants do not directly address any of the counts for which Plaintiff moves for summary judgment. Rather, Defendants spend the majority of their brief pointing to the immateriality of Plaintiff's evidence, the "abusively overlong" nature of Plaintiff's list of material facts, as well as Plaintiff's alleged distortion of the facts. However, Defendants dispute few of the facts crucial to the counts at issue in Plaintiff's motion.

Defendants claim that they do not have sufficient space to adequately oppose Plaintiff's summary judgment motion; however, the Court finds that Defendants had more than enough pages to raise genuine issues of material fact with regard to the counts and issues at hand had they not engaged in the digressions listed above.

The Commodity Exchange Act ("the "Act") requires a CPO to register with the Commission. 7 U.S.C. § 6n. The Act prohibits unregistered CPOs from "ma[king] use of the mails or any means or instrumentality of interstate commerce in connection with his business as [a CPO]. 7 U.S.C. § 6m(1)

This Court previously held that Shasta constituted a commodity pool. See Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2006 WL 3359418 (D.N.J. Nov. 16, 2006); see also Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2005 WL 2864784 (D.N.J. Oct 4, 2005). Likewise, the Court concludes that Equity is the CPO for Shasta, because Equity solicited funds from investors, pooled those funds, and invested them in futures trading through Tech Traders. (Aff. Stephen Bobo at ¶ 5); see also 7 U.S.C. § 1a(4) (defining "commodity pool operator" as "any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts or receives from others, funds...for the purpose of trading in any commodity for future delivery... .")

Other than disputing that Shasta is a "commodity pool" a question of law already decided by this Court, the Equity Defendants do not raise a genuine issue of material fact to dispute Equity's status as a CPO. In addition, it is not disputed that Equity is not registered with the CFTC in any capacity.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 08-1558, 08-1838 & 08-2495

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COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.; VINCENT J. FIRTH
ROBERT W. SHIMER; J. VERNON ABERNETHY;
COYT E. MURRAY; MAGNUM CAPITAL
INVESTMENTS, LTD.; MAGNUM INVESTMENT,
LTD; TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

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On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

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SUR PETITION FOR REHEARING

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Present: SCIRICA, Chief Judge,
SLOVITER, MCKEE, RENDELL, BARRY, AMBRO,
FURENTES, SMITH, FISHER, CHAGARES,
JORDAN and HARDIMAN, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: 9 September 2009

CLD-271 June 14, 2007

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**
C.A. No. 07-1433

COMMODITY FUTURES TRADING COMMISSION

VS.

EQUITY FINANCE GROUP LLC; TECH TRADERS, INC.; VINCENT J. FIRTH; ROBERT W. SHIMER; J. VERNON ABERNETHY; COYT E. MURRAY; MAGNUM CAPITAL INVESTMENTS, LTD.; MAGNUM INVESTMENTS, LTD.*

Robert W. Shimer; Vincent J. Firth,
Appellants

(*Amended per order of 4/25/07)
(D.N.J. CIV. NO. 04-CV-01512)

Present: RENDELL, SMITH & JORDAN, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;
(2) Appellee's motion to dismiss for lack of jurisdiction
(3) Appellants' jurisdictional response;
(4) Appellee's reply to Appellants' jurisdictional response;

(5) Appellant Shimer's response to Appellee's reply; and
(6) Appellant Firth's response to Appellee's reply in the above-captioned case.

Respectfully,

Clerk

MMW/KLB/clc

ORDER

The foregoing Appellee's motion to dismiss the appeal for lack of appellate jurisdiction is granted because the orders appealed from are neither final nor appealable at this time. A final order must end the litigation as to all claims and all parties. Jackson v. Hart, 435 F.2d 1293, 1293 (3d Cir. 1970). The District Court has not expressly directed entry of judgment, Fed. R. Civ. P. 54(b), and the collateral order doctrine does not apply. See Bell Atlantic-Pa. v. Pa. Pub. Util. Comm'n, 273 F.3d 337, 342 (3d Cir. 2001); Carver v. Foerster, 102 F.3d 96, 98 (3d Cir. 1996). Appellants may pursue their appeal of the District Court's entry of partial summary judgment following the disposition of the remaining claims.

By the Court,

/s/ Kent A. Jordan
Circuit Judge

Dated: July 6, 2007
CLC\cc: Mr. Vincent Firth Robert W. Shimer
Merry Lymn, Esq.

Supreme Court, U.S.
FILED

09-647 NOV 27 2009

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
***Petitioners,***

COMMODITY FUTURES TRADING COMMISSION
***Respondent***

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## APPENDIX VOLUME II

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Robert W. Shimer
*Counsel of record*
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645
Date: November 27, 2009

**U.S. Constitution Amendment 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless he or she is on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**28 U.S. C. §1291**

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**7 U.S.C. § 1a(5)**

The term ``commodity pool operator'' means any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of

enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order

**17 C.F.R. § 4.10(d)(1)**

Pool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.

TITLE 17--COMMODITY AND SECURITIES EXCHANGES

CHAPTER I--COMMODITY FUTURES TRADING COMMISSION

PART 4_COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS--
Table of Contents

Subpart B_Commodity Pool Operators

Sec. 4.22 Reporting to pool participants.

**17 C.F.R. §4.22 (a) (1)(i, ii, iii, vi, & vii):**

(a) Except as provided in paragraph (a)(4) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Income (Loss) and a Statement of Changes in Net Asset Value, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (h) of this section.

(1) The portion of the Account Statement which must be presented in the form of a Statement of Income (Loss) must separately itemize the following information:

(i) The total amount of realized net gain or loss **on commodity interest positions liquidated** during the reporting period;

(ii) The change in unrealized net gain or loss ***on commodity interest positions*** during the reporting period;

(iii) The **total amount of net gain or loss** from all other transactions in which the pool engaged during the reporting period, including interest and dividends earned on funds not paid as premiums or used **to margin the pool's commodity interest positions**;

(iv) The total amount of all management fees during the reporting period;

(v) The total amount of all advisory fees during the reporting period;

(vi) **The total amount of *all brokerage commissions during the reporting period***;

(vii) The total amount of other **fees for commodity interest and other investment transactions** during the reporting period; and

(viii) The total amount of all other expenses incurred or accrued by the pool during the reporting period.

**17 C.F.R. §4.22 (a)(3):**

(3) The Account Statement must also disclose any material business dealings between the pool, **the pool's operator,** commodity trading advisor, **futures commission merchant**, or the principals thereof **that previously have not been disclosed** in the pool's Disclosure Document or
any amendment thereto, other Account Statements or Annual Reports.

**17 C.F.R. §4.22 (e):**

(e) The Statement of Income (Loss) required by this section **must itemize brokerage commissions,** management fees, advisory fees, incentive fees, interest income and expense, **total realized net gain or loss from commodity interest trading, and change in unrealized net gain or loss on commodity interest positions during the pool's fiscal year. Gains and losses on commodity interests need not be itemized by commodity or by specific delivery or expiration date.**

Sec. 4.23 Recordkeeping.

**17 C.F.R. §4.23 (a)(1):**

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with Sec. 1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours at the main business office of the pool operator.

(a) Concerning the commodity pool:

**(1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized.**

**17 C.F.R. §4.23 (a)(7):**

**(7) Copies of each confirmation of a commodity interest transaction of the pool, each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant.**

**17 C.F.R. §4.23 (b)(1) & (2):**

(b) Concerning the commodity pool operator:

(1) **An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or** underlying physical, **the futures commission merchant carrying the account** and the introducing broker, if any whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized.

(2) Each confirmation **of a commodity interest transaction,** each purchase and sale statement and each monthly statement **furnished by a futures commission merchant to (i) the commodity pool operator relating to a personal account of the pool operator,** and (ii) each principal of the pool operator relating to a personal account of such principal.

(3) Books and records of all other transactions in all other activities in which the pool operator engages. Those books and records must include cancelled checks, bank statements, journals, ledgers, invoices, computer generated records and all other records, data and memoranda which have been prepared in the course of engaging in those activities.

Sec. 4.24 General disclosures required.

Except as otherwise provided herein, a Disclosure Document must include the following information.

**17 C.F.R. §4.24(b)(1):**

(b) Risk Disclosure Statement. (1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non-United States jurisdictions.

RISK DISCLOSURE STATEMENT

YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT FUTURES AND OPTIONS TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL. **FURTHER, COMMODITY POOLS MAY BE SUBJECT TO**

**SUBSTANTIAL CHARGES FOR** MANAGEMENT, AND ADVISORY AND **BROKERAGE FEES. IT MAY BE NECESSARY** FOR THOSE POOLS THAT ARE SUBJECT TO THESE CHARGES **TO MAKE SUBSTANTIAL TRADING PROFITS** TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THIS DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF EACH EXPENSE TO BE CHARGED THIS POOL AT PAGE (insert page number) AND A STATEMENT OF THE PERCENTAGE RETURN NECESSARY TO BREAK EVEN, THAT IS, TO RECOVER THE AMOUNT OF YOUR INITIAL INVESTMENT, AT PAGE (insert page number).

THIS BRIEF STATEMENT CANNOT DISCLOSE ALL THE RISKS AND OTHER FACTORS NECESSARY TO EVALUATE YOUR PARTICIPATION IN THIS COMMODITY POOL. THEREFORE, BEFORE YOU DECIDE TO PARTICIPATE IN THIS COMMODITY POOL, YOU SHOULD CAREFULLY STUDY THIS DISCLOSURE DOCUMENT, INCLUDING A DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number)

17 C.F.R. §4.24(b)(2):

(2) **If the pool may trade foreign futures or options contracts,** the Risk Disclosure Statement must further state:

YOU SHOULD ALSO BE AWARE THAT **THIS COMMODITY POOL *MAY TRADE* FOREIGN FUTURES OR OPTIONS CONTRACTS.**

TRANSACTIONS ON MARKETS LOCATED OUTSIDE THE UNITED STATES, INCLUDING MARKETS FORMALLY LINKED TO A UNITED STATES MARKET, MAY BE SUBJECT TO REGULATIONS WHICH OFFER DIFFERENT OR DIMINISHED PROTECTION TO THE POOL AND ITS PARTICIPANTS FURTHER, UNITED STATES REGULATORY AUTHORITIES MAY BE UNABLE TO COMPEL THE ENFORCEMENT OF THE RULES OF REGULATORY AUTHORITIES OR MARKETS IN NON-UNITED STATES JURISDICTIONS WHERE TRANSACTIONS FOR THE POOL MAY BE EFFECTED.

**17 C.F.R. §4.24(e)(5) & (6):**

(e) Persons to be identified. The names of the following persons:

(1) Each principal of the pool operator;

(2) The pool's trading manager, if any, and each principal thereof;

(3) Each major investee pool, the operator of such investee pool, and each principal of the operator thereof;

(4) Each major commodity trading advisor and each principal thereof;

(5) **Which of the foregoing persons will make trading decisions for the pool;** and

(6) **If known, the futures commission merchant through which the pool will execute its trades, and, if applicable, the introducing broker through which the pool will introduce its trades to the futures commission merchant.**

17 C.F.R. §4.24 (f)(1)(v):

(f) Business background (1) The business background, for the five years preceding the date of the Disclosure Document, of:

(i) The commodity pool operator;

(ii) The pool's trading manager, if any;

(iii) Each major commodity trading advisor;

(iv) The operator of each major investee pool; and

(v) **Each principal of the persons referred to in this paragraph (f)(1) who participates in making trading** or operational **decisions for the pool** or who supervises persons so engaged.

17 C.F.R. §4.24(g):

(g) Principal risk factors. A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable **to the types of trading programs to be followed, trading structures to be employed** and investment activity expected to be engaged in by the offered pool.

17 C.F.R. §4.24 (h)(1)(i):

(h) Investment program and use of proceeds. The pool operator must disclose the following:

(1) **The types of commodity interests** and other interests **which the pool will trade**, including:

(i) The approximate percentage of the pool's assets **that will be used to trade commodity interests**, securities and other types of interests, categorized by type of commodity or market sector, type of security

(debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating, as applicable;

**17 C.F.R. §4.24(h)(2):**

(2) A description of the trading and investment programs and policies that will be followed by the offered pool, including the method chosen by the pool operator concerning **how futures commission merchants carrying the pool's accounts shall treat offsetting positions** pursuant to Sec. 1.46 of this chapter, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis, **and any material restrictions or limitations on trading required by the pool's organizational documents** or otherwise. This description must include, if applicable, an explanation of the systems used to select commodity trading advisors, investee pools and types of investment activity to which pool assets will be committed;

**17 C.F.R. §4.24 (h)(3)(i & ii):**

(3)(i) A summary description of the pool's major commodity trading advisors, including their respective percentage allocations of pool assets, a description of **the nature and operation of the *trading programs* such advisors will follow, including the types of interests *traded* pursuant to such programs, and each advisor's historical experience trading such program** including material information as to volatility,

leverage and rates of return and **the length of time during which *the advisor has traded* such program**;

(ii) A summary description of the pool's major investee pools or funds, including their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds, including for each investee pool or fund **the types of interests traded**, material information as to volatility, leverage and rates of return for such investee pool or fund and the period of its operation; and

**17 C.F.R. §4.24(h)(4)(i & ii):**

(4)(i) The manner in which the pool will fulfill **its margin requirements** and the approximate percentage of the pool's assets that will be held in segregation pursuant to the Act and the Commission's regulations thereunder;

(ii) If the pool will fulfill **its margin requirements** with other than cash deposits, the nature of such deposits; and

**17 C.F.R. §4.24(i)(2)(ii, iii & x):**

(i) Fees and expenses (1) The Disclosure Document must include a complete description of each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool's participation in investee pools and funds.

(2) This description must include, without limitation:

(i) Management fees;

(ii) **Brokerage fees** and commissions, including interest income **paid to futures commission merchants;**

(iii) Fees and commissions paid **in connection with trading advice provided to the pool**;

(x) **Clearance fees** and fees **paid to national exchanges** and self-regulatory organizations;

**17 C.F.R. §4.24(j)(3):**

(j) Conflicts of interest. (1) A full description of any actual or potential conflicts of interest regarding any aspect of the pool on the part of.

(i) The commodity pool operator;

(ii) The pool's trading manager, if any;

(iii) Any major commodity trading advisor;

(iv) The commodity pool operator of any major investee pool;

(v) Any principal of the persons described in paragraphs (j)(1) (i),
(ii), (iii) and (iv) of this section; and

(vi) Any other person providing services to the pool or soliciting participants for the pool.

(2) Any other material conflict involving the pool.

(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, **from the maintenance of the pool's account with the futures commission merchant or from the introduction of the pool's account to a futures**

**commission merchant by an introducing broker** (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.

17 C.F.R. §4.24(l)(1)(iii):

(l) Litigation. (1) Subject to the provisions of Sec 4.24(l)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; Provided, however, that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed:

(i) The commodity pool operator, the pool's trading manager, if any, the pool's major commodity trading advisors, and the operators of the pool's major investee pools;

(ii) Any principal of the foregoing; and

(iii) **The pool's futures commission merchants and introducing brokers**, if any.

17 C.F.R. §4.24(m):

(m) Trading for own account. **If the commodity pool operator**, the pool's trading manager, any of the pool's commodity trading advisors or any principal thereof **trades or intends to trade commodity interests for its own account**, the pool operator must disclose whether participants will be permitted to inspect the records **of such person's trades** and any written policies related to such trading.

**17 C.F.R. §4.24(s)(1, 3, 4 & 5):**

(s) Inception of trading and other information. (1) The minimum aggregate subscriptions **that will be necessary for the pool to commence trading commodity interests;**

(2) The minimum and maximum aggregate subscriptions that may be contributed to the pool,

(3) The maximum period of time the pool will hold funds **prior to the commencement of trading commodity interests**;

(4) The disposition of funds received **if the pool does not receive the necessary amount to commence trading,** including the period of time within which the disposition will be made; and

(5) Where the pool operator will deposit funds received **prior to the commencement of trading by the pool,** and a statement specifying to whom any income from such deposits will be paid.

Sec 4.25 Performance disclosures.

**17 C.F.R. §4.25(a)(1)(i)(C):**

(a) General principles--(1) Capsule performance information--(i) For pools. Unless otherwise specified, disclosure of the past performance of a pool must include the following information. Amounts shown must be net of any fees, expenses or allocations to the commodity pool operator.

(A) The name of the pool;

(B) A statement as to whether the pool is:

(1) Privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 et seq.);

(2) A multi-advisor pool as defined in Sec. 4.10(d)(2); and

(3) A principal-protected pool as defined in Sec. 4.10(d)(3);

(C) **The date of inception of trading;**

**17 C.F.R. §4.25(a)(1)(ii)(A) & (B):**

(ii) For accounts. Disclosure of the past performance of an account required under this Sec. 4.25 must include the following capsule performance information:

(A) The name of the commodity trading advisor or other person **trading the account** and the name of the trading program;

(B) **The date** on which the commodity trading advisor or other person trading **the account began trading client accounts and the date when client funds began being traded** pursuant to the trading program;

**17 C.F.R. §4.25(b)(1):**

(b) Performance disclosure when the offered pool has at least a three-year operating history. The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i) (A) through (H) and (a)(2) of this Sec. 4.25, where:

(1) The offered pool **has traded commodity interests for three years or more**, and

(2) For at least such three-year period, seventy-five percent or more of the contributions to the pool were made by persons unaffiliated with the commodity pool operator, the trading manager (if any), the pool's commodity trading advisors, or the principals of any of the foregoing.

**17 C.F.R. §4.25(c)(1)(i)&(ii):**

(c) Performance disclosure when the offered pool has less than a three-year operating history--(1) Offered pool performance. (i) The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i)(A) through (H) and (a)(2) of this Sec. 4.25, or

(ii) If the offered pool has no operating history, the pool operator must prominently display the following statement:

THIS POOL HAS NOT COMMENCED TRADING AND DOES NOT HAVE ANY PERFORMANCE HISTORY.

**17 C.F.R. §4.25(c)(2)(i)(A):**

(2) Other performance of commodity pool operator. (i)(A) Except as provided in Sec. 4 25(a)(8), the

commodity pool operator must disclose, for the period specified by Sec 4.25(a)(5), the performance of each other pool operated by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(i) (C) through (H) and (a)(3) of this Sec. 4.25, and the performance of each other account traded by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(ii) (C) through (G) of this Sec. 4.25. If the trading manager has been delegated complete authority **for the offered pool's trading**, and the trading manager's performance is not materially different from that of the pool operator, the performance of the other pools operated by and accounts traded by the pool operator is not required to be disclosed.

**17 C.F.R. §4.25(c)(2)(ii):**

(ii) If neither the pool operator or trading manager (if any), nor any of its trading principals has operated any other pools or traded any other accounts, the pool operator must prominently display the following statement: NEITHER THIS POOL OPERATOR (TRADING MANAGER, IF APPLICABLE) NOR ANY OF ITS TRADING PRINCIPALS **HAS PREVIOUSLY OPERATED ANY OTHER POOLS OR TRADED ANY OTHER ACCOUNTS**. If the commodity pool operator or trading manager, if applicable, is a sole proprietorship, reference to its trading principals may be deleted from the prescribed statement.

**17 C.F.R. §4.25(c)(3)(ii):**

(3) Major commodity trading advisor performance. (i) The commodity pool operator must disclose the performance of any accounts (including pools) directed by a major commodity trading advisor in accordance with paragraphs (a)(1)(ii) (C) through (G) of this Sec. 4.25.

(ii) If a major commodity trading advisor has not previously traded accounts, the pool operator must prominently display the following statement:

(name of the major commodity trading advisor), A COMMODITY TRADING ADVISOR THAT HAS DISCRETIONARY TRADING AUTHORITY OVER (percentage of the pool's funds available for commodity interest trading allocated to that trading advisor) PERCENT **OF THE POOL'S FUTURES AND COMMODITY OPTION TRADING** HAS NOT PREVIOUSLY DIRECTED ANY ACCOUNTS

**17 C.F.R. §4.25(c)(4)(ii):**

(4) Major investee pool performance. (i) The commodity pool operator must disclose the performance of any major investee pool.

(ii) If a major investee pool has **not commenced trading,** the pool operator must prominently display the following statement: (name of the major investee pool), AN INVESTEE POOL THAT IS ALLOCATED (percentage of the pool assets allocated to that investee pool) PERCENT OF THE POOL'S ASSETS **HAS NOT COMMENCED TRADING.**

Case 1:04-cv-01512-RBK-AMD Document 5
Filed 04/01/2004

**In the United States District Court**
**For the District Of New Jersey**

Commodity Futures Trading Commission,
Plaintiff

Civil Action No.

vs

Equity Financial Group LLC,
Tech Traders, Inc
Vincent J. Firth
Robert W. Shimer,
Defendants

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR EX PARTE STATUTORY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## I. INTRODUCTION

The commodity Futures Trading Commission (the "Commission" or "CFTC") seeks emergency injunctive relief to enjoin the fraudulent activities of the Defendants, who are engaged in multi-million dollar solicitation through a web site at http://shastacapitalassociates.com/ and other venues. While touting performance results of approximately 100% or more per year since 2001, Defendants equity Financial Group, LLC ("Equity") and Vincent Firth ("Firth") have solicited and received at least $5 7 million, and likely substantially

more, from at least 29 investors for participation interests in Shasta Capital Associates, LLC ("Shasta"), a commodity pool.[1] In a Private Placement Memorandum distributed to investors and prospective investors, equity and Firth claim that pool participant funds in Shasta are placed with a trading company with access to a managed futures trading system for the trading of commodity futures and selected financial markets While Equity and Firth falsely tout Shasta's "astonishing" performance of 100% or more per annum, it in fact appears that the trading accounts into which the pool participants' funds were placed actually have suffered large losses that have not been disclosed to the pool participants

Although undisclosed in the Private Placement Memorandum and referred to only as the "private trading company," the Commission has learned that the trading company that is trading Shasta investor funds is Tech Traders, Inc. ("Tech Traders") Tech Traders illegally accepted pool participant funds in its own name and misrepresented to the futures commission merchants carrying those accounts that the funds were its own. Tech Traders has incurred trading losses of at least $3.5 million during the last 12 months alone

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[1] A commodity pool is an enterprise engaged in the business of investing its pooled funds in trading commodity futures or options It is analogous to a mutual fund. The collection of common, pooled funds are used to execute transactions on behalf of the entire pooled account, transactions are not allocated to any particular investor The participants' share in accrued profits and losses from the commodity trading on a *pro rata* basis; that is, to the extent they contributed funds to the pool, they get the same percentage of the profits and the losses charged to them *See, e g , Lopez v. Dean Witter Reynolds, Inc ,* 805 F 2d 880 (9th Cir 1986), *CFTC v Heritage Capital Advisory Services, Ltd ,* [1982-1984 Transfer Binder] Comm. Fut L Rep (CCH) ¶ 21,627 at 26,384 (N D. Ill 1982), *Meredith v ContiCommodity Services, Inc ,* [1980-1982 Transfer Binder] Comm. Fut L. Rep (CCH) ¶ 21,107 at 24,462 (D D C 1980)

**C. The Court Erred In Its Conclusion That An Entity Such As Shasta Was Intended By Congress To Be Regulated As A Commodity Pool By The CFTC.**

On page 9 of its Opinion dated October 4, 2005 the Court concludes ""Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool."[12] This conclusion follows a three page analysis of case law in which the Court's discussion focused primarily on *Heritage*, *Lopez* and *Meredith*. It is unclear how a discussion of case law that is completely compatible with the conclusion that Shasta is not a commodity pool per the four tests of *Lopez* supports the Court's stated conclusion on page 9 concerning the intent of Congress. That lack of clarity is further compounded by the fact that neither *Lopez*, *Heritage*, nor *Meredith* engaged in an analysis of Congressional intent with respect to the commodity pool issue presently before the Court for re-consideration.

**1. The Court's Opinion dated October 4, 2005 engaged in no analysis of the legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 to**

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[12] See the last sentence of the first paragraph on page 9 That first paragraph on page 9 actually begins on page 8 of the Court's Opinion dated October 4, 2005.

**support the Court's conclusion regarding the intent of Congress with respect to an entity such as Shasta.**

In its opinion dated October 4, 2005 the Court begins its analysis of the "commodity pool" issue by citing a sentence from the introductory paragraph (entitled "Short Explanation") to Senate Report No. 93-1131 previously cited by the *Lopez* Court.[13] It is interesting to note that even though this particular selected sentence is one of several sentences in that introductory paragraph of the Senate Report, the sentence chosen by both *Lopez* and now the Court refers to the importance of "fair practice" and "honest dealing" on *the commodity exchanges* (which, of course, is exactly where all *actual trading* of commodity futures contracts occurs). This stated concern reflected in the introductory paragraph of Senate Report No. 93-1131 mirrored the concern of H.R 13113, a House of Representatives Bill that had

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[13] It should be noted that this one sentence from Senate Report No 93-1131 is the only reference ever made in the *Lopez* decision to any part of the "legislative history" of the Commodity Futures Trading Commission Act of 1974 other than to point out in its decision that the CEA (as amended in 1974) did not provide the *Lopez* court with any assistance in resolving the threshold issue of whether or not Dean Witter's CGAP account was a commodity pool (See *Lopez*, page 883). *Lopez* found it unnecessary to engage in any extensive analysis of the legislative history of the 1974 amendments to the CEA to construct its four tests The four tests of Lopez were simply a compilation of previous case law

been referred to the Senate Committee on Agriculture and Forestry and was the subject of the Senate Report. The stated purpose of HR 13113 was to amend the Commodity Exchange Act "to strengthen the regulation of *futures trading*". (Emphasis added). See S. Rep. No. 1131, 93rd Con. 2d Sess , reprinted in 1974 U.S. Code Cong & Ad. News, 5843).

No other reference to the legislative history of the Commodity Futures Trading Commission Act of 1974 (hereinafter the "Act") is found in the Court's Opinion dated October 4, 2005. In light of the fact that the actual language of the sentence cited by the Court refers to a concern on the part of Congress for "fair trading" and "honest dealing" *on the exchanges* (where actual futures contract trading occurs), it is difficult to see how that single sentence from the Senate Report is at all helpful in determining that an entity that the CFTC admits has never opened a commodity trading account to trade futures contracts [14] can be said to be the type of entity that was of concern to Congress at the time the CEA was amended by the Act to create the CFTC in 1974.

**2. The legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 provides no basis for**

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[14] See footnote on Page 1 of the CFTC's Response dated August 5, 2005 to Shimer's previous Motion For Summary Judgment dated July 7, 2005

**the Court's conclusion that entities such as Shasta not engaged in the actual trading of commodity futures contracts were intended by Congress to be regulated by the newly created CFTC as commodity pools.**

a. A brief summary of the stated reasons given in Senate Report No. 93-1131 for the 1974 Act that amended the CEA creating the CFTC.

The purpose of the Act (constituting the 1974 amendments to the CEA that created the CFTC) was the need (as cited in Senate Report No 93-1131) for better and extended regulation of the existing commodity futures markets. The Senate Report noted that "since the 1968 amendments to the Commodity Exchange Act, there has been a major shift to a market-oriented economy. As a result futures markets are playing an increasingly important role in the pricing and marketing of the Nation's commodities." S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ad. News, 5843, 5858).

The Senate Report noted that: "(w)hile the futures markets in a number of agricultural commodities have been regulated in varying degrees since 1922, many large and important futures markets are completely unregulated by the Federal Government." [15] The list of unregulated markets

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[15] See S Rep. No 1131, 93rd Con 2d Sess , reprinted in 1974 U.S. Code Cong & Ads. News, 5843, 5859)

included coffee, sugar, cocoa, lumber, plywood and various metals "including the highly sensitive silver market and markets in a number of foreign currencies".[16] The Senate Report thus concluded that "(a) person trading in one of the currently unregulated futures markets should receive the same protection afforded to those trading in the regulated markets". [17]

That same Senate Report noted an increased awareness by the consumer "that futures markets have a direct effect on such matters as his grocery bill and the cost of his home." [18] The Report concluded. "(i)n order to assure that futures markets operate properly and that the prices consumers pay are not artificially high, careful and efficient supervision of the markets is essential" [19] The Senate Report also noted that "(t)he value of futures trading has reached $500 billion annually, substantially exceeding the value of securities trading on the various stock exchanges in this country." [20]

The Senate Report concluded in part: "(t)he importance of futures trading to the general public and to the Nation equals the importance of the securities markets. It is, therefore, time to establish a regulatory authority in the commodity field similar

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[16] Ibid, page 5859
[17] Ibid, page 5859
[18] Ibid, page 5859
[19] Ibid, page 5859
[20] Ibid, pages 5859 & 5860

to the Securities and Exchange Commission..." [21] Most of the legislative history of the 1974 amendments to the CEA focuses on the formation of the CFTC, how that new agency should be constituted and the powers it should have to effect the important purpose of regulating commodity futures trading.

b. The sparse comments in Senate Report No. 93-1131 concerning Section 202 of the 1974 Act that amended the CEA to include a statutory definition of the term CPO point to a conclusion that is contrary to the conclusion of the Court on October 4, 2005.

On page 6 of its Opinion dated October 4, 2005 the Court cites the statutory definition of a CPO now found at 7 U S. C. § 1a(5). That definition is almost the exact same definition originally found in section 202 of Public Law 93-463 as originally enacted in 1974.[22] Senate Report No 93-1131 indicates that the Senate Committee on Agriculture and Forestry basically approved without change the provisions of section 202 of the Act originally contained in House Bill H.R. 13113 for the regulation of oth CTAs and CPOs. Section 202 of the Act contained the definition of a CPO cited by the Court on page 6 of its

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[21] Ibid, page 5860.

[22] The only difference is the fact that the current definition substituted the word "that" for the word "which" in this phrase of the definition "...in a business that is of the nature. ."

Opinion. [23]

The only comment the Senate Committee had with respect to Section 202 of the proposed Act was a concern "...that many individuals who are engaged in the buying and selling of commodities" might offer gratuitous "opinions on the value of commodities". The Senate Committee offered its opinion that any such "incidental" expressions would "...not bring either an employer or employee within the definition of 'commodity trading advisor' ". [24] This sole Committee comment with respect to Section 202 seems to reflect the clear expectation that individuals and entities referred to in Section 202 were expected by the Senate committee to be directly involved in the actual trading of commodity futures contracts.

c. The comments of Senate Report No. 93-1131 concerning Section 205 of the Act also lead to the exact opposite of the conclusion reached by the Court on October 4, 2005

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[23] The Court cites to Pub L No 102-546 after the statutory definition of CPO The current definition varies in no significant way from the definition contained in Section 202 of the 1974 Act as noted by previous footnote 22

[24] See S Rep No 1131, 93rd Con 2d Sess , reprinted in 1974 U S. Code Cong & Ads. News, 5843, 5864).

Even more to the point, however, are the comments found in the Senate Committee's Report with respect to Section 205 of the Act. Section 205 of the Act amended the CEA by adding a section 4n that pertained generally to registration with the newly created CFTC of CTAs and CPOs. Subparagraph 4n(4)(B) of Section 205 of the Act assumed that principals of CPOs might, as individuals, in the course of operating the commodity pool, take "futures market positions" on their own behalf.[25] Any such trading activity by individual principals of commodity pool operators had to be disclosed to pool participants.[26]

Subparagraph 4n(5) of Section 205 of the Act is even *more* on point. That subparagraph is now found currently codified at 7 U S.C. § 6n(4) which states:

> "Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner

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[25] For the full text of Sec 4n(4)(B) of P L 93-463 as enacted by Congress in 1974 see 1974 U S. Code Cong & Ads News, 93rd Con 2d Sess Volume 1, page 1601)

[26] The following comment of the Senate Committee with respect to that particular subparagraph of section 205 generally is instructive. "Futures market positions taken or held by individual principals of commodity trading advisors or commodity pool operators would be required to be fully disclosed to subscribers, clients or participants .." See S. Rep. No. 1131, 93rd Con. 2d Sess , reprinted in 1974 U S. Code Cong & Ads News, 5843, 5873).

> as may be prescribed by the Commission and shall include complete information as to the current status of *all trading accounts in which such participant has an interest.* (Emphasis added)

The Senate Committee's only comment on the above language of the Act was to simply restate the above language.

Finally, subparagraph 4n(7) of Section 205 of the Act authorized the CFTC to revoke deny or suspend the registration of any CPO

> "...if the Commission finds that such denial, revocation or suspension is in the public interest and that—
> (A) the operations of such person disrupt or tend to disrupt orderly market conditions, *or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the price of commodities.*" [27](Emphasis added)

Why would Congress ever deem it necessary to insert such a provision to ostensibly protect the integrity of the commodity futures markets if Congress did not clearly expect that the activities of CPOs would involve direct participation in commodity futures trading on recognized exchanges?

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[27] For the full text of Sec 4n(7) of P L 93-463 as enacted by Congress in 1974 see 1974 U S Code Cong & Ad News, 93rd Con 2d Sess Volume 1, page 1601)

d. Even the language specifically chosen by Congress to describe Title II of the Act itself (which contains Sections 202 and 205) points to the opposite conclusion reached by the Court on October 4, 2005

All provisions of the 1974 Act that pertain to CPOs and CTAs are found in Title II of that Act. Title I of that Act pertained solely to the creation of the CFTC and related provisions. The specific language used to describe the purpose and intent of Title II of the Act is directly instructive and once again points to a conclusion contrary to that of the Court. Title II is entitled: "REGULATION OF TRADING AND EXCHANGE ACTIVITIES". If the activities of CTAs and CPOs were not intended by Congress to directly affect trading and the exchanges on which trading occurs at the time the 1974 Act was passed, why would Congress place all statutory provisions that describe and affect CTAs and CPOs in Title II and use *those specific words* to describe Title II of the Act?

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING )
COMMISSION, and TYRONE C. FAHNER, )
Attorney General of the State of Illinois, )
Plaintiffs )
)
vs )
)
HERITAGE CAPITAL ADVISORY SERVICES, )
LTD , JEFFREY W WEAVER, and WARD )
A. WEAVER, )
Defendants )

Thursday, October 21, 1982
11:00 o'clock a m

Before the HON STANLEY J ROSZKOWSKI, Judge.

Hearing resumed pursuant to adjournment
PRESENT:

Mr. Constantine J. Gekas
Mr. Adrianne S. Harvitt
Mr. Stephen T Bobo

Mr. Robert McFarland

Mr. Paul Homer
Mr. Herbert L. Zarov

BY THE WITNESS:

A Because these are commitments to perform in the future, it is not necessary to buy first and then sell The trader may enter the market selling first

The incentive for entering the market on the buy side is that the trader expects the price of the commodities to rise, thereby hoping to sell later at a higher price.

If he expects the price of the commodity to fall, then he would sell first, hoping to buy later at a lower price, and thus, if his sell price is higher than his buy price, he'll have a profit. If his sell price is lower than his buy price, he'll have a loss

BY MR GEKAS.

Q Well, you've described traders on the floor of the pit and on the floor of the exchanges in areas that are called pits.

A That's right

Q How does a member of the investing public get involved in the futures market?

A A member of the investing public must open an account with a brokerage house which has been designated by the Commodity Futures Trading Commission as a futures commission merchant.

Once the account is opened, the futures commission merchant takes the instructions for the futures trade through.

BY MR GEKAS:

Q What about a commodity pool? In the parlance of the trade of the commodity futures industry, what's a commodity pool?

MR. HOMER: I'm going to object to the question, your Honor. This is one of the ultimate conclusions that is to be drawn as a matter of law.

THE COURT: I think he is asking for her opinion and based upon her expert knowledge what her opinion as to a commodity pool is.

Mr GEKAS: Yes, your Honor With that limitation, I'll pose that question.

BY THE WITNESS

A It's an entity solicited by a – or its solicited by a person or an entity, funds for the purpose of putting them into a common fund and then using funds out of that common fund for the purpose of investing commodity futures contracts

Mr. GEKAS:

Q And within the parlance of the trade and in your opinion, what is the extent of the risk and the potential for profit in that?

Mr. Homer: Objection. I don't find any relevance in that question in this case, your Honor.

THE COURT: I'm going to let her answer This is an opinion of this witness.

BY MR. GEKAS:

Q I mean, how do you share, in terms of your investment, in the profit or loss?

A Oh. In a commodity pool, the participants share in accrued profits from the commodity futures trading on a pro rata basis, that is to the extent that they contributed funds, they get the same percentage of the profits, and the losses are charged in the same fashion.

Q From where does a commodity pool operator get his funds, as a general matter?

A From members of the public.

Q What does he do with them when he gets them?

A He puts it into a common fund in a bank account, and from there – in the name of the pool – and from there he has to go to a futures commission merchant, open up a commodity futures trading account in the name of the pool, and deposit funds into the commodity pool trading account, and then he can begin trading commodity futures contracts.

Q Who does the trading for a commodities pool?

A The pool operator himself may make the trading decisions, or the pool operator may hire a commodity trading advisor to make the decisions for him.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC, TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY
Defendants.

Civil No. 04-1512

**NOTICE OF APPEAL**

Notice is hereby given that Robert W. Shimer ("Shimer") acting pro se hereby appeals to the United States Court of Appeals for the Third Circuit from the final Opinion of the New Jersey District Court identified in the Record as Document No 593 filed on February 4, 2008 and entered February 5, 2008 concluding that Shimer violated the following sections of the Commodity Exchange Act ("Act"): 7 U.S.C. § 6b(a)(2)(i-iii), 7U.S.C § 6*o*(1)(A), 7 U S.C. § 13c(b) and 7 U.S.C. § 13c(a)

Notice is also given that Shimer also appeals the accompanying final Order of the District Court filed on February 4, 2008 and entered on February 6, 2008 identified in the record as Document No. 594 permanently enjoining Shimer as stated therein and requiring disgorgement by

Shimer in the amount of $1,452,117.00 as stated therein and further imposing upon Shimer civil penalties in the amount of $2,904,234.00 as stated therein.

Notice is also hereby given that Shimer further hereby appeals the District Court's previous Opinion (Document No. 472) concluding that Shimer aided and abetted violation by the defendant entity Tech Traders, Inc of CFTC regulation 17 C F.R. § 4.30 and Shimer also further appeals the accompanying District Court Order (Document No 473)

Notice is also hereby given that Shimer appeals the District Court's previous Opinion (Document No 419) filed December 18, 2006 and accompanying Order (Document No. 420) granting partial summary judgment to Plaintiff CFTC with respect to Shimer's alleged violation of 7 U.S.C § 6*o*(1)(B) and 7 U S.C § 6k(2) of the Act

Notice is also hereby given that Shimer **hereby appeals the District Court's Opinion filed November 16, 2006 (Document No. 409) and accompanying Order (Document No. 410) denying Shimer's motion for summary judgment with respect to all counts of Plaintiff's Amended Complaint.**

Notice is also hereby given that Shimer **hereby appeals the District Court's Opinion filed October 4, 2005 (Document No. 266) and accompanying Order (Document No. 267) denying Shimer's previous** 12(b)(1) and 12 (b)(6) motions and Shimer's previous **motion for summary judgment with respect to all counts of Plaintiff's Amended Complaint.**

Dated: Friday, February 15, 2008

/s/ Robert W Shimer
Robert W. Shimer
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645

153

(4)

09-647

IN THE

# Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
***Petitioners,***

COMMODITY FUTURES TRADING COMMISSION
***Respondent***

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## APPENDIX SUPPLEMENT

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Robert W. Shimer
*Counsel of record*
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645
Date: February 8, 2010

Unedited Full Sentence of CFTC Cited Exerpt From 1995 Federal Register

1995 Federal Register
(60 Fed. Reg. 38146 at 38159)

"This requirement for summary performance disclosure of non-major CTAs and investee pools reflects the fact that the trading of pool assets may be distributed among multiple CTAs and investee funds, such that a substantial portion of the pool's assets, all of the pool's assets, or even a multiple of the pool's assets, may effectively be allocated to CTAs or investee pools which are not "major" and about whom performance data and other information may not generally be presented."

**Title 17: Commodity and Securities Exchanges**
PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS
Subpart A—General Provisions, Definitions and Exemptions

17 C.F.R. 4.13(a)(3)(ii)

**§ 4.13 Exemption from registration as a commodity pool operator.** (a) A person is not required to register under the Act as a commodity pool operator if:

(3) For each pool for which the person claims exemption from registration under this paragraph (a)(3):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public in the United States;

(ii) At all times, the pool meets one or the other of the following tests *with respect to its commodity interest positions*, including positions in security futures products, whether entered into for *bona fide* hedging purposes or otherwise:

(A) The aggregate initial margin and premiums required to establish such positions, determined at the time the most recent position was established, will not

exceed 5 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in §190.01(x) of this chapter may be excluded in computing such 5 percent; or

(B) The aggregate net notional value of such positions, determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph:

( *1* ) The term "notional value" shall be calculated for each such futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit, and for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit; and

( *2* ) The person may net contracts with the same underlying commodity across designated contract markets, registered derivatives transaction execution facilities and foreign boards of trade; and

153

(3)

3 - 2010

No. 09-647

# In the Supreme Court of the United States

ROBERT W. SHIMER, ET AL., PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

DAN M. BERKOVITZ
*General Counsel*
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## QUESTION PRESENTED

Whether a person who solicits funds for the purpose of commodity futures trading, but does not directly engage in such trading, can be a "commodity pool operator" within the meaning of 7 U.S.C. 1(a)(5).

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 5
Conclusion ..... 11


## TABLE OF AUTHORITIES

Cases:


*Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 10
*Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1999) ..... 10
*CFTC* v. *British Am. Commodity Options Corp.*, 560 F.2d 135 (2d Cir. 1977) ..... 9
*CFTC* v. *R.J. Fitzgerald & Co.*, 310 F.3d 1321 (11th Cir. 2002), cert. denied, 543 U.S. 1034 (2004) ..... 6
*Lopez* v. *Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986) ..... 7, 8
*Rosenthal & Co.* v. *CFTC*, 802 F.2d 963 (7th Cir. 1986) ... 4
*Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992) ..... 10


Constitution, statutes and regulations:


U.S. Const. Amend. V (Due Process Clause) ..... 10
Commodity Exchange Act, 7 U.S.C. 1 *et seq.* ..... 2
7 U.S.C. 1a(5) ..... 2, 4, 5, 6, 7
7 U.S.C. 6b(a)(2) ..... 2, 3, 4
7 U.S.C. 6*o* ..... 2
7 U.S.C. 6m(1) ..... 2
7 U.S.C. 6n ..... 2

Statutes and regulations—Continued: Page

7 U.S.C. 13c(b) ..... 4
17 C.F.R.:
Pt. 4:
Section 4.10(d)(4) ..... 7
Section 4.25(c)(4)-(5) ..... 7
App. A ..... 7

Miscellaneous:

60 Fed. Reg. 38,159 (1995) ..... 7
H. R. Rep. No. 975, 93d Cong., 2d Sess. (1970) ..... 6

# In the Supreme Court of the United States

No. 09-647

ROBERT W. SHIMER, ET AL., PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-29a) is reported at 572 F.3d 150. The opinion of the district court is reported at 537 F. Supp. 2d 677. Earlier opinions and orders of the district court (Pet. App. 32a-41a, 42a-43a, 44a-52a, 53a, 54a-56a) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on July 13, 2009. A petition for rehearing was denied on September 9, 2009 (Pet. App. 57a-58a). The petition for a writ of certiorari was filed on November 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Commodity Exchange Act (CEA or Act) gives the Commodity Futures Trading Commission (CFTC) broad regulatory power over the conduct of participants in commodity futures markets. See 7 U.S.C. 1 *et seq.* Such markets generally allow investors to buy and sell futures in either individual commodities or in what are known as "commodity pools." Commodity pools are the "commodity-futures equivalent of a mutual fund," *Rosenthal & Co.* v. *CFTC*, 802 F.2d 963, 965 (7th Cir. 1986), in that they aggregate the money of many investors so that it can be invested into a variety of futures by the operator of the commodity pool.

The Act does not define the term "commodity pool," but it defines the term "commodity pool operator" to include:

> any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility

7 U.S.C. 1a(5). Commodity pool operators are required to register with the CFTC, 7 U.S.C. 6n, and unregistered operators may not "make use of the mails or any means or instrumentality of interstate commerce in connection" with their business as operators, 7 U.S.C. 6m(1). Commodity pool operators are also subject to civil liability for fraud. See 7 U.S.C. 6b(a)(2), 6*o*.

2. Petitioners are associated persons of Equity Financial, which was the manager of Shasta Capital Associates (Shasta). See Pet. App. 6a. Between June 2001 and March 2004, petitioners solicited for Shasta approximately $15 million for the purpose of investing in a commodities futures fund called Tech Traders. *Id.* at 6a-8a. Shasta's "Private Placement Memorandum" made clear that investor funds would be used for futures trading, stating that the Shasta funds would be placed with a trading company that would provide access to a "privately managed index futures trading 'portfolio,'" which "takes a unique synergistic approach to the computerized trading of futures contracts on selected financial markets." R. 337-12. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts. R. 337-1.

The CFTC filed a complaint against petitioners, alleging that they were engaged in fraud in violation of 7 U.S.C. 6b(a)(2), 6*o*. R. 1, 64. Petitioners moved for summary judgment on the grounds (as relevant here) that Shasta was not a "commodity pool operator" within the meaning of the Act. See R. 230, 231. In October 2005, the district court denied the motion for summary judgment. Pet. App. 32a-41a. The court concluded that, because Shasta was an investment vehicle in which participant funds were pooled for the purpose of trading futures contracts, Shasta was a commodity pool operator within the meaning of the Act. See *id.* at 39a-40a. The district court held that, so long as Shasta was a vehicle for pooled investments in futures, it was immaterial whether Shasta traded futures directly or whether it traded indirectly through a larger fund such as Tech Traders. See *id.* at 40a-41a.

In February 2008, following a bench trial on remaining issues, the district court entered judgment in favor of the CFTC. 537 F. Supp. 2d 697-700. The court held that petitioners had committed fraud in or in connection with futures transactions, in violation of 7 U.S.C. 6b(a)(2), see 537 F. Supp. 2d at 698, and that petitioners were liable for wrongdoing by Equity under 7 U.S.C. 13c(b) because they were controlling persons of Equity, see 537 F. Supp. 2d at 699.

3. The court of appeals affirmed. Pet. App. 3a-29a. Petitioners' principal argument on appeal was that Equity was not a "commodity pool operator" within the meaning of the Act because Shasta, the fund that Equity managed, did not trade commodity futures contracts directly. *Id.* at 14a.

The court of appeals rejected that contention. The court observed that, under the applicable statutory definition, "[a] commodity pool operator must engage in a business of a particular form; it must solicit, accept, or receive funds, securities, or property; and the solicitation must have a particular purpose—trading commodity futures." Pet. App. 15a. The court further explained that "[t]he solicitation, acceptance, or receipt of funds must be 'for the purpose of trading,' but nothing in the statute imposes an actual trading requirement." *Ibid.* (quoting 7 U.S.C. 1a(5)). The court of appeals concluded that "[t]he plain language of § 1a(5) requires only that the entity be engaged in a business of the proper form, and [that] it solicit, accept, or receive funds for the purpose of trading." *Id.* at 15a-16a.

Petitioners argued that the Ninth Circuit in *Lopez* v. *Dean Witter Reynolds, Inc.*, 805 F.2d 880 (1986), had imposed a direct trading requirement, and that the court of appeals in this case should follow that precedent. Pet.

App. 18a. The Third Circuit held, however, that *Lopez* was inapposite because the legal question in that case was "whether the Dean Witter investment vehicle was an entity of the proper form." *Id.* at 19a. The court explained that "[t]he *Lopez* court confronted different facts and a different legal question. It did not address whether a commodity pool operator must itself execute commodity futures transactions." *Ibid.*

## ARGUMENT

The court of appeals correctly held that an entity may be a "commodity pool operator" within the meaning of 7 U.S.C. 1a(5) if it solicits funds for the purpose of trading commodities futures, even if it does not engage in such trades directly. That ruling does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that Equity was a commodity pool operator. That holding is supported by the text of Section 1a(5) and by the purpose and drafting history of that provision. Section 1a(5) does not limit the term "commodity pool operator" to entities that themselves trade commodity futures, but more broadly encompasses entities that solicit funds for the purpose of conducting such trades.

As the Act defines the term, a commodity pool operator must do two things. First it must be "engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise." 7 U.S.C. 1a(5). Second it must "solicit[], accept[], or receive[]" assets from the public "for the purpose of trading in any commodity for future delivery." *Ibid.* Section 1a(5) contains no language limiting the term "commodity pool operator" to persons who themselves directly conduct futures

trading. The statute refers to futures trading as the "purpose" for which funds are solicited, accepted, or received, but it does not specify who must do the trading.

Adoption of petitioners' interpretation, moreover, would frustrate the purposes of the statutory scheme by affording wrongdoers an easy way to evade statutory provisions designed to protect "unsuspecting traders" from deceptive practices. See H.R. Rep. No. 975, 93d Cong., 2d Sess. 64 (1974) (explaining that a primary concern of Congress was the use of deceptive practices to solicit funds from prospective pool participants). Under petitioners' interpretation of Section 1a(5), individuals could establish a pool and entice participants with deceptive claims about high profitability or low risks, but avoid liability for fraud or failure to register so long as they arranged for their pool to trade through another entity. That result would subvert the intent of the statute. See *CFTC* v. *R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002) (explaining that the CEA is "a remedial statute that serves the crucial purposes of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived"), cert. denied, 543 U.S. 1024 (2004).

The CFTC has consistently interpreted the term "commodity pool operator" to include pools that indirectly trade futures by investing in other commodity pools. For example, the CFTC's regulation on performance disclosures by commodity pools sets forth circumstances in which a pool is required to disclose information about "investee pools" in which it has invested.

17 C.F.R. 4.25(c)(4)-(5).[1] The *Federal Register* release for those rules made clear that the CFTC anticipated circumstances in which all of a pool's assets might be placed with investee pools. See 60 Fed. Reg. 38,159 (1995) (referring to the fact that "a substantial portion of the pool's assets, all of the pool's assets, or even [due to leverage] a multiple of the pool's assets, may effectively be allocated to * * * [certain] investee pools").

Similarly, Appendix A to 17 C.F.R. Part 4 provides guidance for commodity pool operators that operate "fund-of-funds" pools (see note 1, *supra*) regarding the circumstances in which such pools can qualify for certain exemptions from the usual requirement that operators register with the CFTC. Appendix A includes specific guidance for "fund-of-funds" entities that invest in other commodity pools but do no futures trading of their own. 17 C.F.R. Pt. 4 App. A, Situation 1. This guidance necessarily reflects the premise that operators of such funds are "commodity pool operators" within the meaning of the Act, because otherwise they would have no need for exemptions from registration.

The court of appeals was therefore correct to hold that the Act's definition of "commodity pool operator" contains no direct trading requirement. The text of Section 1a(5), its remedial purpose, and CFTC regulations on the subject all support that holding.

2. Petitioners argue (Pet. 10-20) that the decision below conflicts with the Ninth Circuit's ruling in *Lopez* v. *Dean Witter Reynolds, Inc.*, 805 F.2d 880 (1986). That is incorrect. As the court of appeals in this case recognized, the court in *Lopez* considered a different

[1] An investee pool, also known as a "fund-of-funds," is "any pool in which another pool or account participates or invests." 17 C.F.R. Pt. 4 App. A and 4.10(d)(4).

issue, and its holding is consistent with the Third Circuit's decision in this case. In fact, no other court of appeals has squarely considered the question presented here.

In *Lopez*, the Ninth Circuit considered whether the defendant broker's investment program was a commodity pool under the Act. See 805 F.2d at 882, 883. Customers of the brokerage house maintained individual accounts, and a portion of some customers' investments went into a pooled account that was used for trading commodity futures contracts. See *id.* at 882 n.2. Each customer's ability to participate in specific trades depended on the balance in that customer's individual account: not all customers participated in all trades, and the profits or losses allocated to each customer depended on the trades in which that customer had participated. See *ibid.*; *id.* at 884.

The court in *Lopez* held that, in order to constitute a commodity pool under the Act, a business must commingle the funds of various investors into a common fund, which is used to execute transactions on behalf of the entire account. 805 F.2d at 884. The court stated in particular that an essential characteristic of a commodity pool is that "participants share pro rata in accrued profits or losses from the commodity futures trading." *Ibid.* The court concluded that the investment program at issue in that case "did not have the necessary characteristics to constitute a pool." *Ibid.* The court explained that "[t]here was a disparity in investment in the individual accounts, and because of the equity level required to engage in certain purchases and trades, not all accounts traded the same contracts. Therefore, not all accounts shared a pro rata profit or loss." *Ibid.*

The issue in *Lopez* was not whether an entity must directly execute trades in order to be a commodity pool operator. Indeed, as the court of appeals in this case recognized, the defendant in *Lopez* "traded the funds at issue from its own account." Pet. App. 19a. The *Lopez* court's holding that no commodity pool was involved was based on the distinct ground that the investors in that case did not share pro rata in profits and losses. The court of appeals in this case correctly recognized the distinction between the two inquiries and the absence of any conflict between its decision and the ruling in *Lopez*. See *ibid.* (explaining that the court in *Lopez* "did not address whether a commodity pool operator must itself execute commodity futures transactions"). No feeder funds were at issue in *Lopez*, and the court did not address feeder funds even in dictum.[2]

3. Petitioners also argue, for the first time in their petition for a writ of certiorari, that they were denied due process. Pet. 31-37. That argument was not presented to either the district court or the court of appeals. It is well-settled that this Court rarely reviews matters that were not raised below or passed upon by

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[2] Petitioners are likewise wrong in arguing (Pet. 20-21) that the decision below conflicts with the Second Circuit's ruling in *CFTC* v. *British American Commodity Options Corp.*, 560 F.2d 135, 138 (1977). Petitioners base their claim of a conflict exclusively on the Second Circuit's statement that, under the CEA, "persons *actively involved in commodities trading* shall be registered with the Commission." Pet. 21 (quoting *British American Options Corp.*, 560 F.2d at 138). Even read in isolation, that statement is not inconsistent with the understanding that the Act's registration requirements also extend to some persons who do not actively trade in commodities futures but who solicit funds for use in such trading. In any event, the Second Circuit had no occasion in that case to construe the statutory definition of "commodity pool operator."

the court of appeals. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 398-399 (1971); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This is especially true here, as petitioners' due process claim relates solely to the district court's handling of this particular case and raises no legal issues of general significance.

In any event, petitioners' due process argument lacks merit. Petitioners contend (Pet. 32-34) that they were deprived of their "right to be heard" because the district court did not address in sufficient detail the arguments they made in their respective motions for summary judgment. Petitioners had ample opportunity to be heard on the commodity pool issue; indeed, they briefed and argued that issue at least three times before the district court, and again before the court of appeals. Petitioners cite no authority for the proposition that the Due Process Clause required the district court or the court of appeals to address their arguments at any particular level of detail. In any event, the record reflects careful analysis of the disputed statutory question by both of the courts below. See Pet. App. 12a-25a, 37a-41a, 48a-52a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2010

Supreme Court, U.S.
FILED
FEB 8 - 2010
OFFICE OF THE CLERK

No. 09-647

IN THE

# Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH,
EQUITY FINANCIAL GROUP, LLC
***Petitioners,***

COMMODITY FUTURES TRADING
COMMISSION
***Respondent***

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Date: February 8, 2010

## QUESTION PRESENTED

1. Whether the CFTC brief in opposition has provided the Court with a sufficient reason to not grant the petition.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Petitioners' Reply to the "Statement" portion of the Respondent's opposition brief ..... | 2 |
| Petitioners' Reply to the "Argument" portion of the Respondent's opposition brief ..... | 8 |
| Conclusion ..... | 14 |
| Supplementary Appendix ..... | 101a |
| Unedited Full Sentence of CFTC Cited Exerpt From 1995 Federal Register ..... | 102a |
| 17 C.F.R. 4.13(a)(3)(ii) ..... | 103a |


## TABLE OF AUTHORITIES

**Cases**


*CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321 (11th Cir. 2002) ..... 10, 11

*Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986) ..... 5-7, 13

*Rosenthal & Co. v. CFTC*, 802 F.2d 963 (7th Cir. 1986) ..... 3, 4

**Statutes**

7 U.S.C. § 1 *et seq*..... 2
7 U.S.C. § 1a(5) ..... 8, 9, 11, 13
Commodity Futures Trading Commission Act of 1974, Section 202 ..... 8
Commodity Futures Trading Commission Act of 1974, Section 205, section 4n ..... 9

**Regulations**

Appendix A to 17 C.F.R. Part 4 ..... 12
17 C.F.R. § 4.10(d)(1) ..... 10
17 C.F.R. § 4.13(a)(3)(ii) ..... 12, 13

**Miscellaneous**

H.R. Rep. No. 975, 93d Cong., 2d Sess. 1974 . 10
60 Fed. Reg. 38146 at 38159 (1995) ..... 12

IN THE

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

---

The Commodity Futures Trading Commission ("CFTC") brief in opposition fails to squarely address and adequately respond to the many legitimate reasons previously offered by Petitioners for grant of the petition.

**Petitioners' Reply to the "Statement" portion of the Respondent's opposition brief**

1. The Respondent CFTC's basic difficulty in mounting a credible opposition to grant of the petition is located in the first paragraph of page 2 of its opposition brief. There Respondent describes the CFTC's admittedly "...broad regulatory power over the conduct of participants in commodity futures markets. See 7 U.S.C. 1 *et seq.*", and then immediately refers to those "markets" as places where "investors"

> "...*buy and sell futures* in either individual commodities or in what are known as "commodity pools." (Emphasis added).

Petitioner Robert W. Shimer ("Shimer") emphasized the critically important difference in meaning between "trading" and "investing" during oral argument:

> "The act of trading necessarily includes the concept of investing. But the concept of investing does not necessarily require the act of trading." [1]

Both the Respondent's opposition to the petition and the cited conflict that now exists between the circuits is born of the eagerness of the CFTC (and the willingness of the Third Circuit Panel) to ignore the critical and obvious difference between "investors" and "traders". An "investor" in

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[1] See Third Circuit Panel oral argument transcript, page 4, lines 15-18

futures can certainly also be a "trader" in futures if that investor engages in the specific act of buying and selling. But an entity [such as Shasta Capital Associates, LLC ("Shasta")] is not a "trader" and is not engaged in "trading" if it is merely an investor in another entity that trades. An entity such as Equity that manages a non-trading entity such as Shasta is not, by any stretch of the imagination, involved in "trading".

2. On page 2 the CFTC cites to *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986) for the otherwise truthful general statement that commodity pools are the "commodity-futures equivalent of a mutual fund...". The insufficiency of that generally truthful statement to resolve the threshold CEA related summary judgment issues presented in the petition was addressed in the petition.

In *Rosenthal & Co.* [a case cited in footnote 10 of the Third Circuit Panel Opinion (see Pet. App. 13a)] and now cited with equal enthusiasm by the Respondent on page 2 of its opposition brief the issue was whether the fraudulent behavior of Larry Pinckney as a registered "associated person" of the commodity broker firm Rosenthal & Co. ("Rosenthal") could be imputed to Rosenthal under provisions of the CEA. There was absolutely no doubt that the corporate entities managed by Larry Pinckney were operated as "commodity pools":

> "To trade commodity futures for the pools Pinckney had to use a commodities broker registered on the major commodity exchanges,

such as Rosenthal & Company..." *Rosenthal & Co.*, supra at 965.

*Rosenthal & Co.* exemplifies the inability of *any* of the cases cited by Respondent to refute the validity of Petitioners' CEA related "commodity pool/commodity pool operator" summary judgment argument. The cases cited by Respondent consistently *support* Petitioners' argument.

Both the Respondent and the Third Circuit Panel Opinion seem bound and determined to ignore an irrefutable reality: trading for and on behalf of the pool is always conducted by someone *in the name of the pool* from a trading account or trading accounts opened at a Futures Commission Merchant (FCM) such as Rosenthal. With all due respect, there is a certain "Alice in Wonderlandesque" quality to the way the inescapable "reality" of what commodity pools "do" has been so readily and consistently ignored throughout this litigation by both the district court and the appellate court at the urging of the CFTC.

3. Contrary to Respondent's contention in section 2, (second paragraph) page 3 of its opposition brief, Petitioners did *not* first properly move for summary judgment "...on the grounds (as relevant here) that Shasta was not a 'commodity pool operator' within the meaning of the Act." The first *pro se* motion for summary judgment of Petitioner Shimer (DDE No. 230) and the accompanying separate *pro se* motion for summary judgment of Petitioner Vincent J. Firth ("Firth") (DDE No. 231) both filed with the District Court on July 8, 2005

denied that Shasta was operated as a commodity pool by Petitioner Equity by reason of an essential material fact missing from the record (i.e. a trading account opened by anyone in the name of the alleged "pool" Shasta).

In that same paragraph on page 3 of the opposition brief the Respondent also mischaracterizes the holding of the district court. The district court never held that

> "it was immaterial whether Shasta traded futures directly or whether it traded indirectly through a larger fund such as Tech Traders. See *id* at 40a-41a."

One will search in vain for any reference whatsoever to the non-existent and fictional concept of "indirect trading" as a basis for the district court's willingness to twice deny Petitioner Shimer and Firth's separate *pro se* motions for summary judgment. The district court denied the summary judgment motions of Petitioners Shimer and Firth because it pretended to apply the four tests of *Lopez* while virtually ignoring the actual clear and unequivocal language of that Ninth Circuit decision.

4. In the last paragraph on page 4 Respondent reflects the appellate court's mischaracterization of Petitioners' *Lopez* argument. Petitioners never argued that Lopez "...imposed a direct trading requirement, and that the court of appeals in this case should follow that precedent." Petitioners' *Lopez* based argument is not addressed merely to test #4 as a "stand alone argument" though the lack of a

specific "trading account" in the name of the alleged pool Shasta made clear the missing "essential material fact". Test #4 is a logical and necessary extension of the very specific and clear language contained in the previous three tests.

On the next page Respondent also points out correctly that *Lopez* "...did not address whether a commodity pool operator must itself execute commodity futures transactions." The presently cited conflict in the circuits is not extinguished by the Respondent's ability to recognize and recite the obvious. The *Lopez* Court never addressed the specific summary judgment issue raised by the Petitioners' appeal because the Dean Witter "account" described and discussed in Lopez *was clearly a commodity futures trading FCM account.* The *Lopez* court affirmed the district court's grant of summary judgment for Dean Witter because (despite the fact that commodity futures trading was being conducted from that particular FCM "account") the third "test" for determining whether a "commodity pool" existed under any particular set of facts (i.e. pro rata distribution of profits or losses) was not met.

*Lopez* very clearly and obviously stands for the proposition that if *even one* of the four enumerated tests are not met, a "commodity pool" does not exist. The Respondent's argument in defense of the Third Circuit Court's willingness to pretend that all four specific *Lopez* tests really need not be applied to the entity Shasta depends on Respondent's fervent hope that this Court will ignore the following very obvious conclusions that clearly flow from the very precise and specific language contained in all four

"commodity pool" *Lopez* tests derived from prior federal case law:

1) All four tests must be met for a "commodity pool" to exist; and,
2) The language of all four tests when read together, require that the "account" (whose purpose is clearly described by the language of *Lopez* test #1), is an account from which "transactions" (which are in the nature of commodity futures contracts) are "executed" for and on behalf *of that same account (*see *Lopez* test *#2)*; and,
3) The required pro rata distribution of profits or losses to "pool" participants occurs from "the commodity futures trading" (test #3); and,
4) The transactions (referenced in test #2) from the "account" described in test #1 are traded by a commodity pool operator *in the name of the pool* as opposed to being traded in the name of an individual investor. (See *Lopez* test #4).
5) All four tests enumerated by the Ninth Circuit Court clearly refer to the exact same "account" being analyzed to determine if "commodity pool" activity is present with respect to that "account".
6) No "account" ever existed for the entity Shasta that comes *even close* to satisfying the clear language of the four *Lopez* tests.

The *Lopez* court had no reason to focus on and specifically consider the applicability of the "in the name of the pool" requirement of test #4 to the Dean

Witter CGAP account because the presence of that particular test was obviously not in dispute. That fact does not extinguish or remove the cited four-fold conflict that now exists between the Ninth and Third Circuits.

**Petitioners' Reply to the "Argument" portion of the Respondent's opposition brief.**

1. The Respondent's first contention on page 5 of the "argument" section of its brief that the Third Circuit Panel's decision "does not conflict with...another court of appeals" has been adequately addressed in the *Lopez* discussion provided just above as well in Parts I A, B, C & D of the writ petition. That this Court has not yet had occasion to address and answer the specific "commodity pool/commodity pool operator" issues raised by this appeal is not a sufficient reason to deny the petition.

2. The Respondent refers on page 5 of its opposition brief to the "drafting history" of 7 U.S.C. § 1a(5) in support of its contention that the court of appeals was correct in its "interpretation" of the statute. But no such "drafting history" of that statute is ever provided. At the top of page 6 of the opposition brief Respondent also argues that the language of the statute "...does not specify who must do the trading." That argument is a bit disingenuous in light of 1) the extensively referenced CPO trading related regulations of the Respondent CFTC cited in the writ petition (which, in effect, collectively represent a highly relevant regulatory "interpretation" of the statute) (See Pet. App. 64a-81a); and 2) the legislative history of Section 202 of

the 1974 Act that amended the CEA to include the statutory definition of CPO now basically found at 7 U.S.C. § 1a(5) and the legislative history of Section 205 of that same Act. (Pet. App. 86a-93a)

Noticeable by its absence is any attempt by Respondent to discredit or refute Petitioner Shimer's discussion of the comments with respect to Section 205, section 4n of that same Act that accompanied Senate Report No. 93-1131 pertaining generally to registration with the newly created CFTC of Commodity Trading Advisors ("CTAs") and CPOs. (See specifically Pet. App. 90a-93a). It is clear from the cited legislative history of the 1974 Act that amended the CEA and created the CFTC that Congress had a clear and obvious expectation that CPOs would ordinarily be intimately and directly engaged in the actual trading of commodity futures contracts. And, contrary to the preferred "interpretation" of both the CFTC and the Third Circuit Panel, that clear expectation on the part of Congress is reflected in the specific language of 7 U.S. C. § 1a(5).

3. The Respondent argues on page 6 that the "statutory scheme" of the CEA would be "frustrated" if the clear meaning of the statutory language is applied because "unsuspecting traders" would not be protected "from deceptive practices". But this argument brings us, once again, full circle to the inexplicable willingness of the Third Circuit Panel to follow the lead of the Respondent and continuously confuse and blur the clear difference between "traders" and those who are "investors" that do not trade.

The Respondent cites on that same page 6 of its opposition brief to the justifiable concern expressed in H.R. Rep. No 975, 93d Cong., 2d Session, 64 (1974) for protecting "prospective pool participants" from "deceptive practices". The Respondent's difficulty is that the entity Shasta is not a "pool" under the clear four part test enunciated by *Lopez* nor is it a "pool" under the now narrowed regulatory definition of "pool" found at 17 C.F.R. § 4.10(d)(1) that previously, according to the CFTC's own admission, defined a "pool" as "any investment trust, syndicate or similar form of enterprise that *trades* commodity interests". (See writ petition, p. 24).

The Third Circuit Panel Opinion and the Respondent seem perfectly content to ignore the fact that the statement provided by Dr. Clayton Yeutter, Assistant Secretary of Agriculture found at H.R. Rep. No. 93-975, at 79 (1974) specifically expresses a concern that "...unsophisticated *traders* have lost substantial amounts of money through commodity advisors and commodity pool operators..." and further stated that the referenced bill would "...eliminate certain undesirable practices which have enticed unsuspecting *traders* into the markets...". (Emphasis added) (See Panel Opinion at Pet. App. 17a-18a). Where is the legal basis for suddenly extending that justifiable concern about protecting commodity futures traders to entities and members of entities that *are not* "traders"?

In further support of its argument that the "intent" of the CEA would be somehow undermined if the petition is granted and the Third Circuit's

questionable interpretation of 7 U.S.C. § 1a(5) is not adopted, Respondent cites on page 6 of its opposition brief to *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002). R.J. Fitzgerald & Co. ("RJFCO") was a registered introducing broker with the CFTC alleged by the CFTC to have engaged in fraudulent solicitation practices (a cable network commercial and a promotional seminar) to induce individual investors to actually open commodity futures trading accounts at RFJCO. The named RFJCO defendants were alleged, among other things, to have *operated an introducing brokerage firm* to cheat and deceive clients. They also *traded* client accounts excessively in order to generate commissions without regard to customer interests!

General statements made by the Eleventh Circuit Court in that particular case about the "remedial nature" of the CEA and the clear ability of the CEA to reach the behavior of individuals and entities engaged in defrauding investors (solicited to open commodity futures trading accounts and who, in response to those solicitations, actually opened commodity trading accounts and engaged in the trading of commodity futures contracts) offer absolutely no support whatsoever for the Respondent's attempt to defeat the petition and to defend the Third Circuit Court's highly questionable interpretation of the "for the purpose of trading" language of 7 U.S.C. § 1a(5).

4. In further support of the Third Circuit's questionable interpretation of 7 U.S.C. § 1a(5) and in support of a denial of the petition Respondent contends that it "...has consistently interpreted the

term 'commodity pool operator' to include pools that indirectly trade futures by investing in other commodity pools." As pointed out in the writ petition, the CFTC has absolutely no authority whatsoever to broaden or extend the definition of CPO to include entities not presently included within the statutory definition provided by Congress. The CFTC is certainly free to request a revision of the existing statutory definition if it truly feels that to be necessary.

On pages 6 and 7 the CFTC offers the Court what appears to be a carefully edited part of one sentence otherwise buried in forty-five pages of extensive final rule making discussion found in the 1995 Federal Register (60 Fed. Reg. 38146 at 38159) that actually refers to the possible distribution of pool assets to "multiple CTAs" as well as multiple "investee pools". Even if all of a pool's assets are allocated, for example, *to multiple CTAs*, all trading is still being conducted for that pool by each CTA from pool trading accounts opened *in the name of the pool* at a FCM. The author of this Federal Register submission never addresses the "pool" issue raised by the total lack of trading by the entity Shasta. The full *unedited* Federal Register sentence cited by respondent is provided for the convenience of the Court as Petitioners' Supplemental Appendix page 102a following this reply brief.

5. On page 7 of its opposition brief the Respondent also references Appendix A to 17 C.F.R. Part 4 as an apparent reason to support the Third Circuit interpretation of 7 U.S.C. § 1a(5) and deny the petition. The introductory text to Appendix A to

Part 4 "Fund of Funds" refers to the guidance that particular Appendix provides for application of the trading limits of Rule 4.13(a)(3)(ii) to CPOs that operate "fund of funds". That Rule's purpose is not to aid in determining if an entity qualifies as a "pool" but to merely determine if a CPO can forego registration with the CFTC if its pool meets certain predefined regulatory limits on the amount of market risk exposure of the pool's portfolio. Rule 4.13(a)(3)(ii) specifically refers to "commodity interest positions" of the pool which, of course, do not exist without a trading account at a FCM opened in the name of the pool. Relevant portions of Rule 4.13(a)(3)(ii) are provided for the convenience of the Court as Petitioners' Supplemental Appendix beginning at page 103a following this reply brief.

6. Respondent's arguments with respect to *Lopez* found on pages 7, 8 and 9 of the opposition brief have been sufficiently addressed previously in this reply brief. The Respondent does not adequately address the serious specific conflicts described in the petition that now exist between the Ninth Circuit and the Third Circuit Court. Respondent's opposition brief also fails to provide a reasonable answer as to why unnecessary confusion was not created by the Third Circuit Court's unwillingness to recognize and acknowledge the clear distinction between those who "invest" and those who "trade" for the purpose of determining what entities are required to register with the CFTC as CPOs.

## Conclusion

The petition should be granted to definitively address the significant legal issues first stated therein and to resolve the unnecessary conflict in the circuits created by the Third Circuit Court's untenable interpretation of 7 U.S.C. § 1a(5).

Respectfully submitted,

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February 8, 2010